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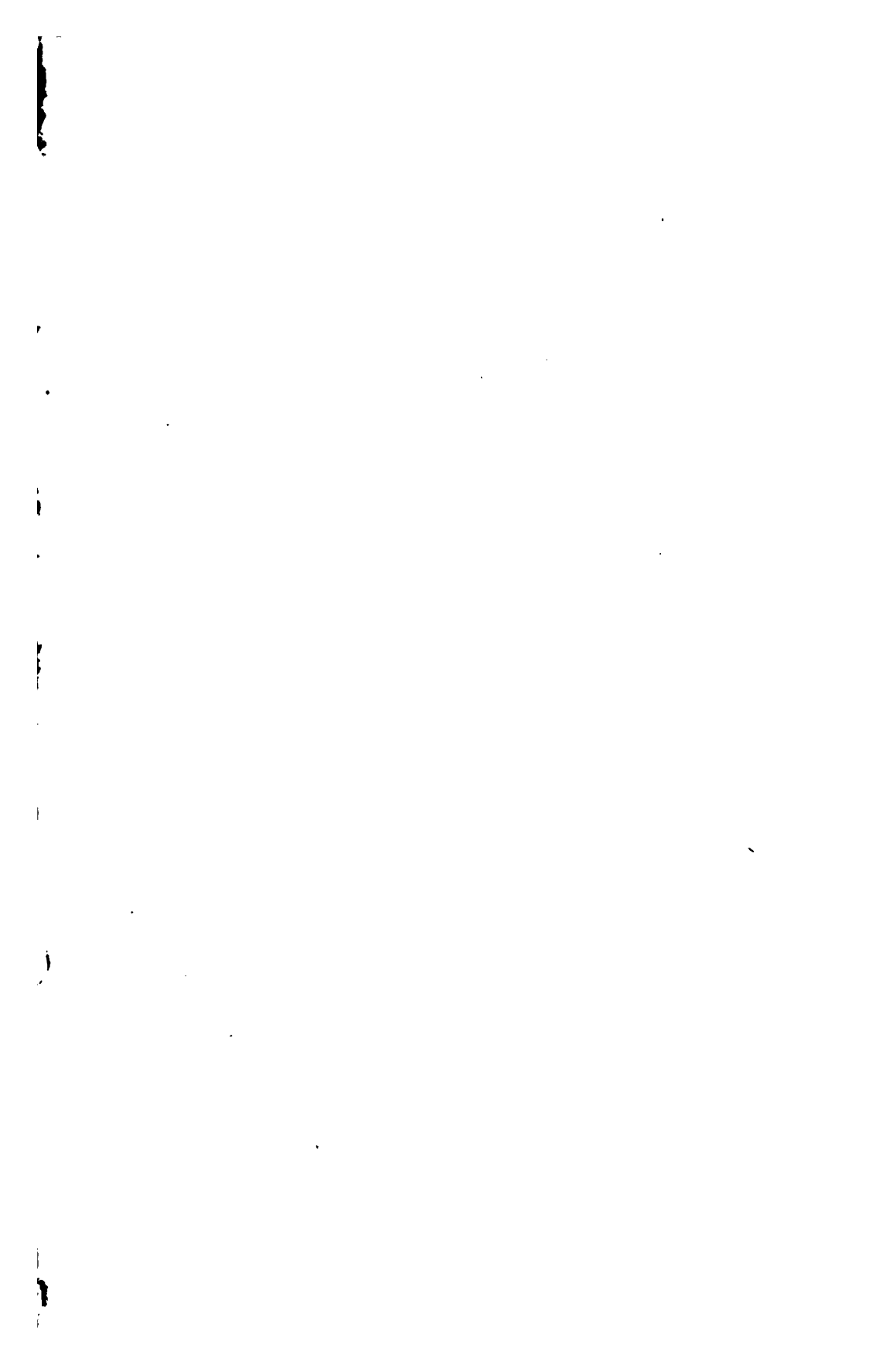
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OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By FRANCIS M. DICE,
OFFICIAL REPORTER.

VOL. 96,
CONTAINING CASES DECIDED AT THE MAY TERM, 1884, NOT
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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†
HON. ALLEN ZOLLARS.‡
HON. EDWIN P. HAMMOND.§
HON. WILLIAM E. NIBLACK.‡
HON. GEORGE V. HOWK.‡

*Chief Justice at the May Term, 1884.

†Term of office commenced January 3d, 1881.

‡Term of office commenced January 1st, 1883.

§Appointed May 14th, 1883, to succeed Hon. WILLIAM A. WOODS.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. GEORGE A. BICKNELL.*†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. JAMES B. BLACK.†

HON. WALPOLE G. COLERICK.§

* Chief Commissioner.

† Appointed April 27th, 1881.

‡ Appointed May 29th, 1882.

§ Appointed November 9th, 1883.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
SIMON P. SHEERIN.

SHERIFF,
JAMES ELDER.

LIBRARIAN,
CHARLES E. COX.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, MAY TERM, 1884, IN THE SIXTY-EIGHTH
YEAR OF THE STATE.

No. 11,302.

BUCHANAN v. HUBBARD.

DEED.—*Infancy.*—*Married Woman.*—*Disaffirmance of Deed.*—*Estoppel.*—A married woman may, at any time during coverture, disaffirm a deed made by her while an infant, and she is not estopped by the facts, that when the deed was executed she appeared and was believed by the grantee to be an adult, that the grantee, with her knowledge after reaching majority, improved the land, and that he had conveyed to an innocent purchaser, and that after majority she, with her husband, enjoyed and exercised dominion over the consideration received.

From the Hendricks Circuit Court.

C. Foley, for appellant.

L. M. Campbell, for appellee.

ELLIOTT, C. J.—The complaint of the appellant is for the recovery of real estate, and the answer of the appellee is an affirmative one, setting forth, with much particularity, the facts constituting the defence. The material allegations of the answer may be thus summarized: On the 3d day of October, 1867, the appellant owned the land in controversy and on that day joined with her husband in a deed of convey-

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ance to Levi Pennington for the consideration of \$1,800, and this deed was duly recorded; on the day the deed was executed the appellant was twenty years, eleven months and twenty days of age. At the time the deed was executed she was married, and had been the wife of John Buchanan for more than four years, to whom she had borne two children. Her appearance indicated that she was of full age, and Pennington, from her appearance and the age of her children, believed that she had attained her majority. Part of the consideration for appellant's conveyance was paid by the execution of a deed to her husband for lands in Kansas, but the deed was made to him with her knowledge and consent. The land in controversy formed part of a farm owned by Chesley Page, the appellant's father, in his lifetime. She resided within a few rods of the land at the time the deed was executed and until she became of age, and a few days after arriving at full age she removed with her husband to Kansas, settled on the land acquired from Pennington, and the deed therefor was duly placed on record. After appellant attained her majority, Pennington, still having no notice of her infancy, paid to her husband for her use \$400 of the purchase-money for the land conveyed to him. She and her husband continued to live on and near the Kansas land until August, 1873, during which time she united with her husband in leasing that land for a period of five years; in the month named she came back to the vicinity of the land in dispute and there remained for five years with full knowledge that her grantee was claiming, encumbering and improving the land as his own. After stating the facts we have summarized, the answer alleges the conveyance of the land to good-faith purchasers for value, and that they bought without knowledge of appellant's non-age at the time of the execution of the conveyance, and it alleges, also, that Pennington is insolvent, and further charges that appellant for more than fifteen years neglected to disaffirm her conveyance.

The reply admits that the appellant owned the land in her

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own right, and states how she acquired title, admits the execution of the deed by herself and husband to Pennington, and that she was of the age of twenty years, eleven months and twenty days; it admits, also, the removal to and residence in Kansas, and the execution of conveyances to good-faith purchasers. It is averred that the appellant did not know of her right to disaffirm her conveyance until November, 1882, and that on the 7th day of the following month she did disaffirm, and did serve written notice of disaffirmance on the appellee. The reply denies the payment of \$400 to her husband for her use after she became of age, denies, also, that she knew that Pennington was encumbering or conveying the land, and that the deed to the Kansas land was delivered to her. A demurrer was sustained to this reply, and on that ruling rests the assignment of error.

It appears from both answer and reply, that appellant was an infant *feme covert* at the time the deed was executed, and that the disability of coverture still exists. The deed of an infant is voidable, and when duly disaffirmed ceases to be effective, and as the appellant was an infant when the deed was executed, she had *prima facie* a right to disaffirm it, but in order that the disaffirmance of a deed executed by an infant should be effective, it should appear to have been made in due season.

The existence of the disability of coverture exerts an important influence upon the question of the due exercise of the right of a grantor to disaffirm a deed made while an infant. Whatever may be the influence of coverture upon other questions, there can be no doubt that it exerts an important and controlling one over the question of the reasonable exercise of the right to disaffirm. It is firmly settled that a married woman may at any time during coverture disaffirm a deed executed by her before she arrived at full age. *Richardson v. Pate*, 93 Ind. 423; *Applegate v. Conner*, 93 Ind. 185; *Sims v. Smith*, 86 Ind. 577; *Sims v. Snyder*, 86 Ind. 602; *Sims v. Bardoner*, 86 Ind. 87; S. C., 44 Am. R. 263, auth. n.; *Stringer*

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v. *Northwestern, etc., Ins. Co.*, 82 Ind. 100; *Sims v. Everhardt*, 102 U. S. 300.

The question remaining for decision is whether the facts stated in the answer, and not denied by the reply, estop the appellant from avoiding her deed.

The fact that *bona fide* purchasers have acquired rights does not preclude a grantor from disaffirming a deed made before arriving at full age. The deed of an infant may be avoided whether the land is held by the original grantee or has passed into other hands. *Miles v. Lingerman*, 24 Ind. 385; *Sims v. Smith*, *supra*.

The reply denies that the consideration for the land was received by the appellant, and so we need not inquire what would have been the effect of the receipt of the consideration by her. It is quite clear that the fact that the appellant resided near the land, and had knowledge of the character of the conveyances, can not work an estoppel; nor can the fact that her grantee had made improvements estop her from asserting her infancy in avoidance of the deed. *Richardson v. Pate*, *supra*; *Wilhite v. Hamrick*, 92 Ind. 594. Whether the value of improvements made by the appellant's grantee might be recovered under a proper counter-claim or cross complaint, is not a question here, for no such claim is asserted.

The cases to which we have referred show very clearly that a *feme covert* can not be estopped from avoiding a deed made while an infant, on the ground that her husband received and retained the consideration paid by the purchaser. The fact, that she unites with her husband in enjoying or exercising dominion over the property received by the husband as part of the consideration, does not preclude her from asserting the disability of infancy against her grantee.

What took place before Mrs. Buchanan became of age can not estop her. The doctrine of estoppel is sparingly and guardedly applied to infants, and even if the appellant had expressly represented herself to be of age, the representation

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would not have operated as an estoppel. *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Jennings*, 62 Ind. 111; *Conrad v. Lane*, 26 Minn. 389; S. C., 37 Am. R. 412.

It is assumed by the appellee's counsel, that although the deed was made on the 3d of October, the contract was not complete until the 15th of that month, when possession was delivered, and that, as Mrs. Buchanan was of age at that time, she can not now avoid the deed. We are strongly inclined to agree with counsel, that if the contract was not complete until the 15th of October, and was then consummated by the voluntary delivery of possession, the deed must be sustained. There is much reason for this conclusion. The deed is not voidable because the grantor was a *feme covert*, but because she was an infant, and if the contract was not completed until after the disability of infancy ceased, that disability can not avail. If the contract was not executed until after Mrs. Buchanan arrived at full age, and was then consummated, the fact that she was a *feme covert* will not impair its force. But, although we have been strongly pressed by the hardship of the case, and have endeavored to find some fact that would justify us in holding that the contract was not consummated until after the appellant became of age, we have been unable to do so. The language of the answer clearly imports that the contract was consummated on the 3d of October, and the averments of the reply expressly affirm that the deed was executed on that day.

The infirmity of the deed to Pennington, the appellee's remote grantor, grows out of the disability of infancy, and not of coverture, so that if the first disability did not exist the second can not overthrow appellee's title. To a limited extent it is therefore true, as counsel claims, that there is no question of the disability of coverture involved in this case, but counsel carries the proposition, that there is no question of double disability, much beyond its legitimate effect. Upon the question of the right to disaffirm and the time of disaffirmance, the disability of coverture assumes an important

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and ruling position, and hence, there is necessarily involved both the disability of infancy and that of coverture.

We can not escape the conclusion that the trial court erred in sustaining appellee's demurrer to the appellant's reply, and we must, therefore, reverse the judgment.

Filed May 29, 1884.

No. 10,306.

DUBOIS v. JOHNSON.

DIVORCE.—Custody of Children.—Statute Construed.—Res Adjudicata.—Where a divorce is granted, it is the duty of the courts, R. S. 1881, section 1046, without regard to the issues or the wishes of the parties, to make provision for the custody of the minor children, and where a decree on that subject is entered subject to future modification, it is an adjudication upon all the facts then existing, whether actually in proof or not, touching the fitness of the parties to have such custody.

SAME.—Modification of Decree.—In such case a subsequent modification of the decree as to children can only be made for reasons occurring after the original decree.

SAME.—Evidence.—In such case, where a divorced husband applies to modify the decree which gave custody of a child to the wife, upon the ground that at the time of the application she was living in open and notorious fornication with one D., proof of her adultery, or other indecent acts, with D. before the divorce is inadmissible, even as tending to illustrate facts occurring afterwards.

SAME.—In such case evidence of the good character of D. is admissible.

From the Superior Court of Marion County.

F. Winter and *W. W. Herod*, for appellant.

G. K. Perrin, *R. N. Lamb*, *S. M. Shepard* and *A. L. Mason*, for appellee.

ZOLLARS, J.—On the sixth day of October, 1880, appellee was divorced from appellant. She has since intermarried with George W. Dubois.

The allegations of the complaint upon which the divorce was granted were, that appellant was high tempered, used coarse and abusive language toward appellee, neglected to prepare

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his meals, and finally abandoned him. The complaint showed that the parties had two children, one a boy fifteen years old, and the other a girl nine years old. There were no averments of the fitness or unfitness of either party to have the custody and care of the children, nor was there any special prayer as to such custody. The prayer of the complaint was for a divorce, and for all other proper relief. Following that part of the decree granting a divorce to appellee is the following: "It is further ordered, pursuant to agreement of the parties in open court, that, until the further order of this court herein, the said plaintiff shall have the care and custody of the minor child, William Artemas Johnson, to be supported at his own expense, and that the defendant shall have the care and custody of the minor child, Orra Ann Johnson, to be supported at her own expense, except when with the plaintiff as hereinafter provided: *Provided*, however, that the custody of Orra Ann Johnson shall be had by the plaintiff, if he so desires, during the summer months of each year; at all other times to be had by the said defendant." It was further provided that each party should have the right to visit the child in the custody of the other.

Under this order and decree, the little girl remained with the mother until June, 1881, when she was sent to spend the summer months with her father. Instead of returning her to the mother at the end of the summer months, appellant, in August, 1881, filed his complaint in room No. 1 of the superior court, in which the divorce was granted, asking that the order and decree should be so modified as to give him the exclusive custody of the child. The complaint charged appellant as being unfit to have the care and custody of the child; that before the divorce she had been guilty of adultery with Dubois and others, and had been guilty of other lewd and indecent conduct; that since the divorce she had lived with Dubois in open and notorious fornication, etc. If appellant was guilty of the various things charged against her, there can be no question about her unfitness to have the care

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of the little girl. It was averred that, while appellee had been suspicious of appellant's conduct before the divorce, he did not know of it, although he had made efforts to inform himself. It is proper to observe, however, that he is shown to have known, at the time of the trial, of most of the evidence he now seeks to make available.

At the time this complaint was filed, and at the time the case was heard below, appellant had not remarried. The evidence shows, however, that at that time, and for some months prior thereto, there was a marriage engagement between her and Dubois.

Upon a hearing at special term, the court refused to modify the order as asked, but left it as originally made. After a motion for a new trial was overruled, appellee appealed to the general term, where the judgment was reversed and a new trial ordered.

From this judgment at general term appellant prosecutes this appeal. The judgment was reversed upon the ground, principally, that the court at special term erred in excluding testimony of acts of adultery, and other acts of misconduct on the part of appellant previous to the divorce. It was held that these acts should have gone in evidence as explanatory and corroborative of the evidence as to her conduct since the divorce was granted.

We think that under the statute providing for appeals to this court from judgments of the superior court at general term, the several grounds urged in that court for a reversal of the judgment are before us for decision, so far as they are discussed in this court. The controlling question is, did appellee have the right, upon the hearing of this case, to prove acts of adultery, and other acts of misconduct on the part of appellant prior to the decree of divorce, and the order and decree in relation to the custody of the children? The arguments of the respective counsel upon this point are elaborate and able. It would extend this opinion to an undue length to go into an examination of the many cases cited by

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counsel; from the view we take of the case it would not be profitable to do so.

As we have said, the complaint in the case for divorce did not attack the character of appellant for chastity or morality. No question was there made by any kind of averment as to her fitness to have the care and custody of the little girl.

It is argued, therefore, by counsel for appellee, that nothing was, or could have been, adjudicated in that case as to her fitness or qualification, and that, therefore, he had the right upon the hearing of this case to show her unfitness by proof of her misconduct both prior and subsequent to the divorce.

We are of the opinion that the question of the fitness or unfitness of the parties to have the care and custody of the children was just as fully before the court as if specific averments and charges upon that question had been made in the pleadings.

In cases of divorce, which result in the breaking up of the home, the law commits to the care of the court, in a measure, the safety and welfare of the children.

The statute is as follows: "The court in decreeing a divorce shall make provision for the guardianship, custody, support, and education of the minor children of such marriage." Section 1046, R. S. 1881. *Logan v. Logan*, 90 Ind. 107; *Bush v. Bush*, 37 Ind. 164; *Musselman v. Musselman*, 44 Ind. 106.

This duty is imposed independent of the wishes of the parents, and independent of any issues they may make in the pleadings, as to their fitness or unfitness for such custody.

In such cases, the court has the right, if necessary, to commit the children to the custody of either party, to the exclusion of the other, or to commit them to the custody of strangers. The court not only has the right, but owes the duty, to inform itself as to the character of the parents, and their ability to properly care for, nurture and train the children. And this right and duty it has, and owes, whatever the issues made by the pleadings may be, or whether or not any issues at all upon the subject are made by such pleading.

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Whatever, therefore, is competent evidence to enlighten the judgment of the court as to the fitness and qualification of the parties for the care and custody of the children, the court may and should hear in decreeing a divorce.

In determining, therefore, what was before the court upon the subject, in the divorce proceedings, we are not to look alone to the issues made by the pleading, but also to the statute which fixes the duty and power of the court.

Had the court heard evidence and made the order and decree in relation to the custody of the children, as an unconditional and final decree, it must be clear that, as between the parties, it would have been a final adjudication upon the subject of their fitness or unfitness for such custody at that time. Such an adjudication would doubtless, also, have been conclusive upon the court. Of course, the welfare of the children is the prime consideration, and should be so regarded in the hearing of the case, and the making of the decree. But when the case has been heard, and a final decree entered, the doctrine of *res adjudicata* applies as in any other case. There must be an end to such litigation. If, in this case, appellee has the right to go into the conduct of the appellant prior to the decree awarding the custody of the child, he may do so in any number of subsequent proceedings for a modification of that decree, and thus the court may be called upon to re-try the issues already settled.

It is important to the child that there shall be an end to such litigation. No good can come to it from re-exposures of the faults of its parents. When the fitness of its custodian is once settled, that settlement should be regarded as final up to that time. If, in fact, such custodian is an unfit person, that unfitness will most likely be made manifest by subsequent conduct. In such case the court may change the custody of the child.

In making the order, however, no evidence seems to have been heard by the court, but the order was made upon the agreement of the parties. Whether the court should have

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acted upon the agreement, we need not here inquire. It did so act, and our opinion is that, by such agreement, each party conceded and agreed to the fitness of the other, at that time, to have the care and custody of the child as ordered by the court; that by such agreement each is as much bound as if the order and decree had been made upon testimony heard by the court, and that the order and decree based upon the agreement was an adjudication upon the question of appellant's fitness at that time to have the custody of the little girl. For the purpose of the order and decree, the agreement took the place of testimony.

We need not decide what might have been the power of the court to modify or make further orders in relation to the children, had that made been unconditional. It was not such. The court reserved to itself the right to make further orders in the premises. The question is not free from difficulty, but our opinion is that in making such modification or further order the action of the court must be based upon the conduct or changed circumstances of the parties subsequent to the order made in the divorce case. At that time, as we have said, the question of appellant's fitness for the custody of the child was before the court and was adjudicated. In this case the question of her fitness at the time the complaint was filed, and the case was heard, was before the court for judicial determination. What was adjudicated in the former action can not be gone into in this.

Had the court been made aware of the acts of adultery, and the other lewd and indecent acts on the part of appellant, which appellee now charges and proposes to prove, it can not be reasonably supposed that the court would have left the child in her custody. The agreement of appellee, upon which the court based its order, amounted to evidence that she was not so guilty. The order of the court, therefore, based upon that agreement, amounted to an adjudication that she was not so guilty, and that she was a suitable person to have the custody of the child.

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There are cases in some of the other States in which it has been held that, upon a charge of adultery at a certain time, proof of such acts at other times is competent as tending to show the nature of the intercourse of the parties at the time charged, but none of them, that we now recollect, extends the rule in its application back of an adjudication. We have no case in this State deciding the exact point under discussion as here presented, but we have cases which we think virtually settle the principle involved. We think, too, that our views in this case are supported by the decided weight of the authorities. In the case of *Williams v. Williams*, 13 Ind. 523, it was held that a decree in a divorce case assigning the custody of children is final and conclusive, and can not be disregarded in a subsequent proceeding by *habeas corpus* to obtain possession of such children. HANNA, J., speaking for the court, said: "Under the statute, the care and custody of the children of the marriage was a proper question for the court, in decreeing a divorce, to pass upon; and having so done, that adjudication can not be collaterally inquired into, it is manifest, as to matters preceding it, and which were directly involved and settled. * * * It is suggested, that the application, for the custody of the child, should have been made in the court which granted the divorce, and as a part, or continuation of that proceeding. Without doubt, it would have been eminently proper for the application to have been so made; that all matters, which have since arisen, might have been heard and determined." The substance of this is that courts may modify the decree awarding the custody of children in divorce cases, but such modification must be upon matters which have arisen *subsequent* to the decree. This commends itself to our judgment as the reasonable rule.

In the case of *Baily v. Schrader*, 34 Ind. 260, an application was made for the modification of the decree in a divorce case awarding the custody of the children. The decree was for the custody of the children until the further order of the court. The application for a modification of the decree was

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based upon matters which arose subsequent to the decree. It was held that as the decree was made the court had power to modify it, but nothing was presented, and nothing was decided, as to the right of the court to hear evidence as to the fitness of the parties at and before the decree was rendered.

In the case of *Sullivan v. Learned*, 49 Ind. 252, it was decided, with a dissenting opinion, that unless the power to modify the decree in a divorce case, as to the custody of the children, is reserved in the decree, no such power exists. The dissenting opinion is based upon the ground that without such reservation the courts possess the power to change the order and decree when based upon matters arising subsequent to the decree.

In the case of *Lewis v. Lewis*, 106 Mass. 309, it was held that the dismissal of a libel for a divorce, for the cause of adultery, on the ground that the adultery was not proved, is conclusive evidence, in subsequent proceedings for divorce between the parties, that the alleged act was not committed.

There is, or was, a statute in Michigan which provided that, after a decree for alimony, the court may, from time to time, on the petition of either of the parties, revise and alter such decree respecting the amount of such alimony or allowance, and the payment thereof, etc.

This statute clearly reserved to the court as much power to modify such decree as was reserved by the order in this case. The subject-matter is not the same, it is true, but the statute and order are so analogous that an adjudication upon one is authority upon the proper construction of the other. It was held by the Supreme Court of that State that, under the statute, such modification can be made only on new facts transpiring subsequent to the decree. The court said: "The section must be construed to mean one of two things. It may be construed as empowering the court to change the decree for alimony, from time to time, on facts existing when the decree is granted, or on new facts thereafter transpiring; or as only authorizing a change on the latter when they are of such

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a character as to make it necessary to suit the new state of facts. The last we think is the true construction. * * * * We are led to believe that the statute was intended to provide for such new circumstances, and that that was all the Legislature had in view in enacting it; that it was not designed to affect the right of appeal, or to give to the court granting alimony power to review and to reverse or modify its own decree. Such a power would be unprecedented, and out of the ordinary course of judicial proceedings." *Perkins v. Perkins*, 12 Mich. 456. This case was followed in the case of *Chandler v. Chandler*, 24 Mich. 176. In this case a petition was filed for a modification of the decree awarding the custody of a child to the mother, and a weekly payment by the father for its support and education. It was held that as no new facts, or change of circumstances upon which to found an alteration of the decree, were set forth, no such alteration should be made.

Under a statute similar to that in Michigan, the Supreme Court of Iowa, in the case of *Blythe v. Blythe*, 25 Iowa, 266, said: "Although the court granting a divorce has, by force of our statute, power to make changes in the decree in respect to property and children, yet this power certainly ought not to be exercised, only upon such change of circumstances as demand the change in the decree. That is to say, the original decree is conclusive upon the parties as to their then circumstances; and the power to make changes in the decree is not a power to grant a new trial or re-try the same case, but only to adapt the decree to the new or changed circumstances of the parties." To the same effect, see *Wilde v. Wilde*, 36 Iowa, 319; *Buckminster v. Buckminster*, 38 Vt. 248; 2 Bishop Mar. & Div., section 429, and cases cited; *People v. Mercein*, 3 Hill, 399; *Mercein v. People*, 25 Wend. 64.

In this case it was held that an adjudication on the question of the custody of an infant child, brought upon *habeas corpus*, may be pleaded as *res adjudicata*, and is conclusive upon the same parties in all future controversies relating to

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the same matter, and upon the same state of facts, and that upon a subsequent hearing on *habeas corpus*, evidence should not be heard which goes back of the previous adjudication.

Without further extending the opinion upon this question, we hold that the court, at special term, correctly excluded the testimony as to the conduct of appellant prior to the decree, awarding the custody of the child to her, and that the court, at general term, erred in holding otherwise, and in reversing the judgment.

At special term, the court, over the objection of appellee, admitted testimony as to the good character of George W. Dubois. We think this was not error. For some months prior to the hearing of the case, as we have elsewhere stated, there was a marriage contract existing between him and appellant. Upon the consummation of that marriage, the child, when in the custody and family of appellant, would necessarily be an associate with Dubois. His character and habits would necessarily have an influence upon her. It was proper and necessary, therefore, that the court should know what that influence might be. If it would be vicious and degrading, that would be a very good and sufficient reason for changing her custody from appellant. This position is fully sustained by the case of *Darnall v. Mullikin*, 8 Ind. 152.

It is further insisted that the finding and judgment of the court, at special term, are not sustained by sufficient evidence. The argument is that the evidence as to appellant's conduct and character shows that she was not a proper person to have the care and custody of the child. We have carefully examined the evidence, as well as the arguments of counsel thereon. There is a conflict in the evidence. The trial court had the witnesses before it, and hence had a much better opportunity to judge of their credibility than we have. We can not, therefore, say that that court erred upon the evidence. The question of the custody of the child was very much in the discretion of the court below. We are not prepared to say that there was any abuse of that discretion.

 Luck v. The State.

Upon the whole case as presented in this court, we discover no sufficient reason for a reversal of the judgment of the court at special term.

The judgment of the court below, at general term, is, therefore, reversed, with costs.

Filed June 7, 1884.

 No. 11,527.

LUCK v. THE STATE.

CRIMINAL LAW.—*Misconduct of Bailiff and Jury.*—Where, upon the evidence, the verdict is clearly right, the fact that the bailiff, having the jury out, under order of the court, for exercise, took them past the scene of the crime with which the defendant was charged, is not sufficient ground for a new trial, where it appears that nothing occurred to influence the jury.

SAME.—*Venue.*—*Evidence.*—Where the venue of an alleged crime is laid in the county of Floyd and State of Indiana, proof that the crime occurred in the city of New Albany, Indiana, is sufficient proof of the venue.

SAME.—*Manslaughter.*—*Intent.*—*Supreme Court.*—Where, upon a violent and unlawful attack, death soon ensues, a jury may find an intent upon the part of the assailant to kill, and the Supreme Court will not interfere to reduce a verdict of voluntary manslaughter to involuntary manslaughter.

From the Floyd Circuit Court.

J. V. Kelso and *D. C. Anthony*, for appellant.

F. T. Hord, Attorney General, *F. B. Burke*, Prosecuting Attorney, and *W. B. Hord*, for the State.

HAMMOND, J.—The appellant and one John Roarke were charged in the indictment with murder in the first degree for killing Philip Oberhouser, on July 14th, 1883, in Floyd county. The appellant's separate trial terminated in his conviction for voluntary manslaughter, and his sentence to the State prison for fifteen years. His motion for a new trial was made at the proper time, and the overruling of that motion is assigned for error. The causes set out in the motion for

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Luck v. The State.

a new trial were certain alleged misconduct of the jurors, and the insufficiency of evidence to sustain the verdict.

Affidavits, filed in support of the appellant's motion for a new trial, were to the effect that during the trial the jury were to be kept together, under the charge of a bailiff, and under his charge were to take their meals at a hotel convenient to the court-house; that at the hotel named they could have their meals in a room by themselves, and removed from all danger of outside influence; that on the second day of the trial, and thereafter until the return of their verdict, the jury, without the knowledge or consent of the appellant, took their meals at a boarding-house, more distant from the court-house than the hotel; that the keeper of the boarding-house was hostile to the appellant and his defence, and, with others of the community, was anxious for his conviction; and that at the boarding-house there were no conveniences for the jurors to take their meals by themselves, so as not to be brought in contact with improper influences; that the jury, after retiring for deliberation, left their room and were seen walking upon the streets of New Albany; that they passed by the place where the homicide, for which the appellant was on trial, was committed; that one of their number made inquiry of a boy and received from him information of the surroundings of the place; and that the jurors were not kept together when upon the streets, but were permitted to talk with persons not on the jury.

Counter affidavits of the bailiff and eleven of the jurors were filed, showing, substantially, that the court instructed that the jury should, during the trial, be taken by the bailiff to some convenient place for their meals; that they were at first taken to the hotel in question, but, becoming dissatisfied with the board there, were, during the balance of the trial, taken to the boarding-house referred to; that the boarding-house was only about twenty-five yards further than the hotel from the court-house; that at the boarding-house the jury

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were furnished their meals in a room by themselves, and had no conversation or communication at any time with any person or persons not connected with the jury, and did not at any time hear any conversation between other persons relating to the case on trial, and did not come in contact with persons hostile to the appellant or his defence; that at no time during the progress of the trial, before or after their retirement to deliberate upon their verdict, was any juror separated from the others unless attended by the proper officer; that, under the instructions of the court, the jury were taken out to walk for exercise on one occasion; that on such walk they passed the place of the homicide, but had no conversation with any person concerning such place or its surroundings; that they made no examination of such place, and asked for no information respecting it; that during such walk the jury were attended by their bailiff; that they did not separate; and that nothing occurred at any time to prejudice the rights of the appellant.

The affidavits filed by the prosecution negated the allegations of the affidavits filed in support of the appellant's motion for a new trial so far as to show that the jury were subjected to no influences whatever by others, and that they were in no respect attempted to be tampered with.

The affidavits filed in behalf of the appellant were not made by any person who pretended to have conversed or communicated with the jury, nor to have been present at any such alleged conversation or communication, nor is the name given of any person alleged to have had any conversation or communication with them.

The affidavits do not show that there was anything at or about the place of the homicide, the inspection of which could have enabled the jury to give any point to the evidence, or to gain any information that was prejudicial to the rights of the appellant. The place of the homicide seems to have been wholly wanting of a single local circumstance, the knowledge of which could have added to, or diminished, the prob-

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ability of appellant's guilt. A witness, who resided on the opposite side of the street from the scene of the crime, testified that, from her room, she heard what occurred at the time of its commission, and gave the particulars of what she heard. It is claimed by counsel for the appellant that the jury, by passing the place, could see for themselves that the witness was in a position to hear what she testified to. But her evidence was not contradicted at the trial, nor was there any effort made to show that her position was unfavorable for hearing what she stated in her evidence. We think it clearly appears that the jury in passing the place did not learn any fact that could have given additional weight to the witness's testimony.

The evidence is in the record and makes out a clear case of guilt. Between ten and eleven o'clock of the night of July 14th, 1883, on one of the streets in the city of New Albany, the appellant who was in company with others, met the deceased with whom he had no previous acquaintance. An altercation, growing out of a trifling matter ensued, during which the appellant struck the deceased with his fist or something in his hand, knocking him down on the pavement, and then gave him a number of violent kicks. As soon as it could be done, the deceased was carried to the office of Dr. Easley, near by, where he died in a few moments. The doctor testified that the deceased was in a dying condition when brought to his office; that his nose was broken; that there was a contusion on the top of his head; and that he died of cerebral hemorrhage caused by the rupture of a blood-vessel at the base of the brain. The verdict was clearly right, or, at least, the appellant has no right to complain. If there was any error it was upon the side of leniency.

The conduct of the bailiff, in walking with the jury about the city and passing the place of the homicide, was reprehensible in the extreme, and for it he was deserving of punishment. Such conduct upon the part of a careless or perverse bailiff often makes a new trial necessary, greatly to the prej-

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udice of the administration of justice. The authority of the court to take the jury walking for exercise should not have been construed as permission to go with them where they did. But with respect to such misconduct the law is well settled that it will not authorize a new trial where, as in the present case, it is shown that the jury were not subjected to any improper influences, and were not in any way attempted to be tampered with, and where the verdict is clearly right upon the evidence. *Barlow v. State*, 2 Blackf. 114; *Creek v. State*, 24 Ind. 151; *Riley v. State*, 95 Ind. 446; *Jones v. People*, 6 Col. 452; S. C., 45 Am. R. 526.

Counsel for the appellant urge that the evidence fails to prove the venue as laid in the indictment. The indictment was returned by the grand jury of Floyd county, and the offence was charged to have occurred in that county. The evidence shows that the homicide was committed in the city of New Albany. We are bound to know that that city is in Floyd county. The evidence as to the venue was sufficient. *Wiles v. State*, 33 Ind. 206; *Whitney v. State*, 35 Ind. 503; *Chuck v. State*, 40 Ind. 263; *Beavers v. State*, 58 Ind. 530.

As already stated the appellant was found guilty of voluntary manslaughter. The distinction between voluntary and involuntary manslaughter is, that in the former there is a purpose or intention to take life; but in the latter the killing is unintentional, but is done in the commission of some unlawful act. Section 1908, R. S. 1881; *Bruner v. State*, 58 Ind. 159; *Adams v. State*, 65 Ind. 565.

It is insisted that the evidence fails to show that the appellant intended to take the life of the deceased, and that the conviction, therefore, should have been for involuntary manslaughter. The question of intent was one of fact for the jury. The jury must have found that the appellant intended to kill the deceased. We are not able to say that this conclusion was wrong. The violent attack upon the deceased, speedily followed by fatal consequences, leaves reasonable ground for the inference that there was a purpose to take life.

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The evidence, at any rate, tends to justify such a conclusion, and in such case we can not reverse the judgment merely upon a question of evidence.

There was no error in overruling the motion for a new trial. The judgment is affirmed.

Filed May 29, 1884.

No. 9459.

MORROW ET AL. v. UNITED STATES MORTGAGE COMPANY.

FOREIGN CORPORATION.—*Filing Appointment of Agent.*—*Contracts by.*—An instrument made by a foreign corporation, and deposited in the clerk's office pursuant to section 3022, R. S. 1881, showing that A. has been appointed "its agent for transacting business at I.," makes A. its general agent at that place, so that his acts will bind the corporation.

SUBROGATION.—*Mortgage.*—*Agreement.*—Where an assignee of the equity of redemption pays and takes up one of several notes secured by mortgage, under an agreement with the mortgagee that he may hold them in the same manner as the mortgagee held them, he is entitled to the same priority of lien that a stranger would have who took an assignment thereof.

From the Superior Court of Marion County.

N. B. Taylor, F. Rand and E. Taylor, for appellants.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Baker, E. Daniels, W. Henderson, W. Wallace, L. Wallace and L. Newberger, for appellee.

NIBLACK, J.—On the 17th day of July, 1875, James B. Hunter and wife executed to the United States Mortgage Company a mortgage on certain real estate, in the city of Indianapolis, to secure the payment of three bonds, or writings obligatory, for the repayment of money loaned, the first for \$4,000, payable on the 1st day of August, 1879, the second for \$5,000, payable on the 1st day of August, 1881, and the third for \$5,000, payable on the 1st day of August, 1883, all at nine per cent. interest until maturity, and ten per cent. interest thereafter. Coupon notes were, also, executed for the

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amount of interest to fall due on each bond before maturity in such numbers and in such manner as to make the interest payable semi-annually. The mortgage provided that in default of payment of any instalment, whether of principal or of interest, the entire indebtedness should become due and collectible at the option of the mortgagee. Soon after the execution of the mortgage, one Samuel Hester became, through intermediate conveyances, the ostensible owner of the mortgaged property, and executed a junior mortgage upon it to one Thomas J. Trusler. Hester made default and Trusler obtained a decree of foreclosure of his junior mortgage, and the mortgaged property was ordered to be sold subject to the senior mortgage. The property was accordingly sold on the 3d day of March, 1877, at sheriff's sale, and Trusler became the purchaser. During the succeeding year, Trusler assigned his certificate of purchase to Wilson Morrow one of the appellants, who, on the 5th day of March, 1878, received a sheriff's deed for the mortgaged property, coming into possession soon afterwards under his deed. Previous to the 1st day of August, 1878, the United States Mortgage Company, the appellee here, transmitted the coupon notes, becoming due at that date, to the Bank of Commerce of the city of Indianapolis, endorsed as follows:

"Pay Bank of Commerce, Indianapolis, for collection, account of U. S. Mortgage Company.

"W. P. ELLIOTT, Assistant Secretary."

On the 3d day of August, 1878, under some kind of a special arrangement with William Henderson, then sole resident agent of the mortgage company, Morrow paid the amount due upon, and took up, these coupon notes. Early in February, 1879, Morrow, under some similar arrangement, paid the amount due upon, and took up, the coupon notes which had fallen due on the 1st day of that month, and had been endorsed as above to the Bank of Commerce for collection.

Morrow declined to pay any further instalments of interest, and the mortgage company commenced this suit to foreclose

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its mortgage, making Hunter and wife, Morrow and wife, and others, having had, or then claiming to have, an interest in the mortgaged property, defendants in the action. Morrow, first in his answer and afterwards by way of cross complaint, charged that he paid and took up the coupon notes, which had been endorsed to the Bank of Commerce for collection as above stated, under an express agreement with the mortgage company that he was to become thereby the owner of such notes, and to hold them in the same manner as that in which the company had theretofore held them, that is to say, as a prior lien under the mortgage, and demanded that the amount paid by him upon said coupon notes, with interest, should be decreed to be a first lien in his favor.

Issues being formed, the court below at special term made a finding upon the controlling facts in the cause, coming to the conclusion, amongst other things, that Morrow had become the owner and holder of the coupon notes lastly above mentioned, as claimed by him, and that there was due him for principal and interest upon such coupon notes the sum of \$1,470, which, in the decree of foreclosure which ensued, was declared to be a lien under the mortgage prior to the aggregate amount due the mortgage company for principal and subsequent instalments of interest.

Upon an appeal to the general term, the decree at special term was reversed upon the ground that the evidence failed to show that Henderson, the mortgage company's agent, and through whom Morrow obtained possession of the coupon notes in question, had either the power or the authority to enter into, and to bind the company by, such an express agreement as that set up and relied upon by Morrow. Morrow and his co-defendants below have appealed to this court, questioning only the correctness of the decision at general term as between Morrow on the one side and the mortgage company on the other.

At the time Hunter executed the mortgage sued on in this action, Alexander C. Jameson was a joint agent for the mort-

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gage company with Henderson, and as between them and the company, he and Henderson acted under a written contract entered into on the 8th day of October, 1874, commencing with a preamble as follows:

"Whereas, William Henderson and Alexander C. Jameson of Indianapolis, Indiana, have been appointed agents of 'The United States Mortgage Company,' a corporation chartered by the Legislature of the State of New York, for the purpose of making loans for said company on bond and mortgages, in the State of Indiana, and collecting moneys to become payable upon such loans."

On the 26th day of December, 1874, the mortgage company caused to be deposited in the office of the clerk of the Marion Circuit Court of this State, a duly executed certificate of appointment, with order pertaining thereto annexed, the body of which was in these words:

"Whereas, 'The United States Mortgage Company,' a corporation created by the laws of the State of New York, located in the city of New York, have appointed William Henderson and Alexander C. Jameson its agents for transacting business in the city of Indianapolis, county of Marion and State of Indiana:

"Now, Therefore, it is ordered by said 'United States Mortgage Company,' that any citizen or resident of the State of Indiana, having a claim or demand against the said 'United States Mortgage Company,' arising out of any transaction in said State of Indiana, with such agents, may sue for the same in any court of competent jurisdiction, and maintain an action in respect to the same, in any such court in the said State, and that service of process in such action, and on said agents, shall authorize judgment, and all other proceedings against said 'United States Mortgage Company.'

"S. D. BABCOCK, President.

"A. J. KOCK, Secretary.

"NEW YORK, Dec. 23d, 1874."

Henderson and Jameson acted accordingly as agents in the

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city of Indianapolis, until the latter part of February or the early part of March, 1878, when, by the verbal directions of the secretary of the mortgage company, the entire business of the company at that city was transferred to and placed in the hands of Henderson alone.

Morrow and Henderson do not agree as to the precise terms upon which the former paid and took up the coupon notes upon which the former's counter-claim is based, but there was evidence tending to establish that these notes were paid and taken up upon the terms and conditions charged in Morrow's cross complaint. If, therefore, the alleged terms and conditions were such as Henderson was presumably authorized to enter into on behalf the mortgage company, we can not disturb the finding of the court below at special term.

Section 1 of the act of June 17th, 1852, concerning foreign corporations, now known as section 3022, R. S. 1881, enacts, that "Agents of corporations not incorporated or organized in this State, before entering upon the duties of their agency in this State, shall deposit in the clerk's office of the county where they propose doing business therefor the power of attorney, commission, appointment, or other authority under or by virtue of which they act as agents." 1 R. S. 1876, 373.

The certificate of his appointment, deposited with the clerk of the Marion Circuit Court, as above, constituted Henderson a general agent for the transaction of the mortgage company's business at the city of Indianapolis, and became, under this section of the statute, the measure of his authority when acting on behalf of the company. Third parties were not, consequently, required to look to, or take notice of, any private agreement between him and the company, which might be construed as placing a narrower limit upon his agency.

If Morrow had paid and taken up the coupon notes in controversy as a junior incumbrancer merely, and without any express agreement with the mortgage company, he would, at his option, have become subrogated to the rights of the company in the notes, subject only to the condition that he could

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not enforce their payment as a lien against the mortgaged property, while any part of the mortgage debt thereafter to become due remained unpaid. *Vert v. Voss*, 74 Ind. 565; *Rice v. Morris*, 82 Ind. 204; *Carithers v. Stuart*, 87 Ind. 424; *Sheldon Sub.*, section 4.

But the express agreement, which the evidence tended to establish, was that Morrow, on paying and taking up the notes, should be permitted to hold them in the same manner as the company had theretofore held them, that is to say, as a prior and subsisting lien enforceable against the mortgaged property by appropriate foreclosure proceedings. That amounted, in legal effect, to a waiver on the part of the company of its right to insist upon a postponement of Morrow's claim for reimbursement until the remainder of the mortgage debt was satisfied, as it might have done in the absence of such an agreement, and fairly overcame the presumption which would have been otherwise operative against him, that he took up the coupon notes merely to protect his title acquired through the junior mortgage. See, also, *Sheldon Subrogation*, section 22. This implied waiver was doubtless assented to under the belief that the mortgaged property was sufficient for the payment of all the liens upon it.

The agreement as to the manner in which Morrow should hold the notes after paying them was incidental merely to the collection of certain instalments of interest accruing upon the principal debt, and was, as we think, clearly within the scope of Henderson's authority as general agent of the company. In its substantial import it was nothing more than an agreement that the doctrine of subrogation should be modified in one respect in its application to the notes in the hands of Morrow.

In our view of the case, therefore, the question as to Henderson's alleged want of authority to sell and transfer a note belonging to the mortgage company, argued by counsel, is in no way involved in the decision of this cause. *Sheldon, supra*, at section 6, says: "Subrogation to the rights of a creditor is to be distinguished from an assignment of the debt, by

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the fact that the latter assumes the continued existence of the debt, while the former follows only upon its payment. Before the right of subrogation accrues, there must be a discharge of the legal obligation resting upon the party ultimately liable." The same author, as a part of section 13, further says: "The true principle, I apprehend, is, that where money due upon a mortgage is paid, it shall operate as a discharge of the mortgage or in the nature of an assignment of it, as may best serve the purposes of justice and the just intent of the parties."

Taking all the facts and circumstances which the evidence tended to prove into consideration, we would not feel justified in holding that the court below at special term erred in its conclusion that Morrow had become subrogated to all the rights of the mortgage company in the indebtedness set up by him as a counter-claim. *Parsons v. Tillman*, 95 Ind. 452.

The judgment at general term is reversed with costs, and the cause remanded with instructions to the general term to affirm the judgment at special term.

ELLIOTT, C. J., did not participate in the decision of this cause.

Filed June 3, 1884.

No. 11,318.

MARTIN v. ORR ET AL.

INJUNCTION.—*Enjoining Lawsuit.*—*Defence.*—The defendant can not, as a general rule, enjoin the prosecution of legal proceedings upon grounds of which he might avail himself in the defence of such proceedings.

From the Fountain Circuit Court.

T. F. Davidson, for appellant.

J. McCabe, *L. P. Miller* and *C. M. McCabe*, for appellees.

HOWK, J.—This was a suit by the appellant, Martin, against the appellees, in a complaint of five paragraphs. The sep-

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arate and several demurrers of the appellees to each of the paragraphs of complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, were sustained by the court to the first, second and third paragraphs, and to each of these rulings the appellant excepted. Thereupon he withdrew his fifth and sixth paragraphs of complaint, and, declining to amend the first, second or third paragraphs thereof, judgment was rendered against him for appellees' costs.

Errors are assigned here by the appellant, which call in question the decisions of the circuit court, in sustaining the appellees' demurrers to each of the first, second and third paragraphs of his complaint.

In the first paragraph of his complaint, the appellant alleged that on March 1st, 1876, he with others executed to the appellee John M. Carnahan a promissory note, of which the following is a copy :

" ATTICA, IND., March 1, 1876.

" One year after date, we promise to pay to John M. Carnahan, guardian of Robert E. Orr and Lawrence Orr, six hundred dollars, value received, without any relief from valuation or appraisement laws, ten per cent. per annum.

(Signed)

" F. YERKES,

" WM. L. D. COCHRAN,

" A. L. WHITEHALL,

" EDMOND COCHRAN.

" JAMES MARTIN.(security)."

That appellant was a security on such note for the other makers, and received no part of the consideration; that Franklin Yerkes was the principal debtor, and the other makers were his sureties, and that these facts were known to Carnahan, when he took the note; that after the maturity of the note, in March, 1877, appellant gave to and served upon said Carnahan, who was then the owner and holder of the note, a written notice to forthwith institute an action upon the note against the makers thereof; that Carnahan did not institute an action on the note, as required by such notice,

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until the 15th day of August, 1877, on which day he commenced suit on the note against the makers thereof, and, on September 26th, 1877, he obtained a judgment by default against such makers in the court below; that, after obtaining such judgment, the appellee Carnahan did not proceed with diligence to take out execution thereon, but delayed so to do until the 17th day of November, 1877, and thereafter failed to prosecute such execution or to cause the same to be levied on the property of the principal debtor; that the said Yerkes was then and has been since a resident of Fountain county, and had therein at the rendition of such judgment, and for six months thereafter continued to have, ample property, subject to execution, to satisfy the same.

And the appellant averred that the co-appellees of said Carnahan claimed to have acquired some title to or interest in such judgment, and that they with Carnahan were threatening to cause an execution to issue on such judgment against the appellant's property, and that Carnahan and his co-appellees were then prosecuting a motion for leave to issue execution on such judgment; that in a proceeding, duly commenced in the court below at its May term, 1883, wherein the appellant was plaintiff, and the said Franklin Yerkes was the defendant, it was then duly adjudged by the court that the appellant was a surety only of Yerkes in the aforesaid judgment; that appellant was the owner of real estate in Fountain county, and that said judgment was an apparent lien thereon and a cloud upon his title thereto. Wherefore the appellant prayed the court to enjoin the appellees, and each of them, from taking out any execution upon such judgment against him or his property, and from the further prosecution of their motion for leave to issue execution, and for a decree declaring the judgment discharged and of no effect as to him, and for other proper relief.

The second paragraph of the complaint differs from the first paragraph only in this, that it omits the averment that Yerkes had, in Fountain county, at the rendition of the judg-

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ment, and for six months thereafter continued to have, ample property subject to execution to satisfy the judgment.

The third paragraph of the complaint contains all the facts stated in the first paragraph, with some other allegations in relation to the property of Yerkes, the principal debtor. In the view we take of this case, it is unnecessary for us to give the substance even of these additional allegations.

In each of the paragraphs of his complaint the appellant sought to enjoin the suit or proceeding instituted by the appellees in the court below against him and the other judgment defendants, and then pending and undetermined, to obtain the leave of the court to issue an execution on such judgment. In such suit or proceeding it would seem to be clear that the court in which it was pending had ample jurisdiction to hear the matters complained of by the appellant in this case, so far as material, and afford all such relief in the premises, legal or equitable, as the facts established would warrant. The appellees' suit or proceeding, of which the appellant complains in this case, was fully authorized by the statute; and there can be no doubt, we think, that upon hearing of that suit he could have obtained all the relief he now seeks, to which the facts in evidence might show he was entitled. This was apparent upon the face of each paragraph of complaint in the case in hand. There was no necessity, therefore, for the institution of this suit by the appellant.

In High on Injunctions, p. 31, section 46, it is said: "The most frequent ground for refusing relief by injunction, against a suit at law, is that the defence urged may be used in the action at law itself without resort to equity. And it may be laid down as a general rule that legal proceedings will not be enjoined on grounds of which the person aggrieved may avail himself in defence of the action at law." This general rule has been recognized and acted upon by this court. *Hartman v. Heady*, 57 Ind. 545. In the recent case of *Palmer v. Hayes*, 93 Ind. 189, the rule is thus stated: "Proceedings

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of a court at law are never enjoined, where that court has jurisdiction to afford complete relief, and where the party has full opportunity to make good the defence."

Applying the rule under consideration to the facts stated by the appellant in each paragraph of his complaint, it is manifest, we think, that no substantial error was committed by the court in sustaining appellees' demurrers to each of such paragraphs. For it was shown in each paragraph of his complaint that the court had jurisdiction to afford appellant complete relief in the appellees' suit mentioned therein, and that upon the hearing of that suit the grounds upon which he relied, in the case at bar, were available to him as matter of defence. The judgment is affirmed with costs.

Filed May 29, 1884.

No. 10,923.

THE BOARD OF COMMISSIONERS OF ALLEN COUNTY v.
BACON.

BRIDGES.—*Complaint.*—*County Commissioners.*—*Notice.*—*Negligence.*—In a complaint against a county for injury resulting from a defective bridge negligently permitted to become so by the rotting of its timber, it is not necessary to aver that the board had notice of the condition of the bridge.

SAME.—*Township.*—*Repair of Bridges.*—An answer in such case, that the bridge had been built and always maintained by the township and its supervisors, and that they had sufficient means to keep it in repair, is bad on demurrer.

SAME.—*Verdict.*—*Answers to Interrogatories.*—Findings in answer to interrogatories, that no defect in the bridge was apparent, and, also, that the plaintiff had, on the day before the injury, examined it, are not inconsistent with a general verdict for the plaintiff.

EVIDENCE.—*Harmless Error.*—The admission of unnecessary and immaterial evidence is a harmless error.

SAME.—*Hearsay.*—Conversations between persons not parties to the suit or their agents, and never communicated to either party, are not competent evidence.

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HIGHWAY.—User.—Dedication.—Instructions.—Evidence.—Harmless Error.—

Where, in an action for injury resulting from a defective bridge, the evidence shows without dispute that the bridge was located on a highway which had been used as such for more than twenty years, an instruction that fifteen years' public use makes a highway, though erroneous, is harmless, the verdict being clearly right on the evidence.

From the Superior Court of Allen County.

T. E. Ellison and *F. W. Rawles*, for appellant.

R. S. Robertson and *J. B. Harper*, for appellee.

BICKNELL, C. C.—The appellee brought this action to recover damages for injuries sustained by the appellant's neglect to repair one of its bridges.

The first error assigned is overruling a demurrer to the complaint for want of facts sufficient. The objection is failure to allege that defendant had notice of the defective condition of the bridge.

Where a municipal corporation is charged with negligence, in permitting its highway or bridge to be dangerous, and the danger is created by the wrongful act of another, the complaint must allege that the corporation had notice of such dangerous condition, or else must state facts from which such notice may be fairly inferred. *City of Lafayette v. Blood*, 40 Ind. 62; *Higert v. City of Greencastle*, 43 Ind. 574; *City of Ft. Wayne v. De Witt*, 47 Ind. 391; *Town of Elkhart v. Ritter*, 66 Ind. 136.

But where the dangerous condition of the bridge or highway is not created by the wrongful act of another, but arises from the act of the corporation itself, or from decay or rottenness of the structure, it is sufficient in the complaint to charge generally the negligence of the defendant in the act or omission complained of, and no averment as to notice is necessary. *City of South Bend v. Paxon*, 67 Ind. 228; *City of Indianapolis v. Scott*, 72 Ind. 196; *Board, etc., v. Brown*, 89 Ind. 48.

The complaint in the case before us avers that the plaintiff was crossing, with a loaded wagon, a wooden bridge of the defendant on a highway, which bridge it was the duty of the

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defendant to keep in repair and in safe condition for the passage of such wagons, but that defendant, neglecting its duty, permitted the supports of said bridge, and the stringers on which the planks were laid, to become rotten and dangerous, so that when the plaintiff drove thereon, it fell and let the wagon into the stream below, without any fault of the plaintiff, to his damage \$250, by reason of the said rotten and unsafe condition of said bridge and the neglect of the defendant to repair the same.

Under the authorities above cited, there was no error in overruling the demurrer to the complaint. It is not necessary in such a case to aver that a defendant had notice of its own omissions. The defendant was chargeable with knowledge that timber will rot and decay by lapse of time and exposure to the weather, and it was its duty to use ordinary care to detect and guard against such decay. *Board, etc., v. Emmerson*, 95 Ind. 579. The complaint charges a want of such ordinary care.

The defendant answered in two paragraphs:

1st. The general denial.

2d. That the bridge mentioned in the complaint was in Madison township, and was a short bridge built by said township, and has always been kept in repair and controlled by the supervisors and superintendents thereof, and that this defendant never had the custody or management thereof, and never had knowledge of any defect therein, and that it was within the means of said township to keep said bridge in repair.

To the second paragraph of said answer a demurrer was sustained, and error is assigned upon this ruling.

The appellant claims that sections 5064 and 5065, R. S. 1881, which require the superintendent of roads in each township to take charge of all bridges in his township, and repair them as far as the prudent use of the means in his hands will permit, relieves the county of some of its obligations, and

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that the only bridges which the county is bound to repair are those which it would be beyond the means of the township to repair.

But we think the county is bound to keep its bridges in repair although the means of the township may be sufficient, and although the township officer may fail to do his duty.

The office of superintendent of roads was abolished by section 35 of the act March 2d, 1883, Acts 1883, p. 73; but while sections 5064 and 5065, *supra*, were in force, they did not, and the statutes now in force, which direct in what manner bridges shall be built, and by whom the expense of repairing them shall be borne, do not change the duty of the county board, nor make it any less incumbent on that body to see that the bridges of the county are in good repair.

The act of March 3d, 1855, section 11, which is incorporated in the R. S. of 1881 as section 2892, provides, that "The board of commissioners of such county shall cause all bridges therein to be kept in repair," and this court, in *Board, etc., v. Brown*, 89 Ind. 48, has said: "If it is the duty of county boards to repair, or cause to be repaired, the bridges of the county, such boards are under obligation to the public to exercise a reasonable degree of affirmative and active diligence to ascertain the condition of the public bridges of the county, and see to it that they are kept in repair and reasonably safe and fit for travel." See *Yeager v. Tippecanoe Tp.*, 81 Ind. 46; *House v. Board, etc.*, 60 Ind. 580 (28 Am. R. 657); *Pritchett v. Board, etc.*, 62 Ind. 210; *State, ex rel., v. Board, etc.*, 80 Ind. 478 (41 Am. R. 821); *State, ex rel., v. Demaree*, 80 Ind. 519; *Board, etc., v. Deprez*, 87 Ind. 509.

The fact that the bridge was short, and might have been, but was not, repaired by the township, is no excuse for the failure of duty on the part of the county board. There was no error in sustaining the demurrer to the second paragraph of the answer.

The issue was tried by a jury, who returned the following verdict, interrogatories and answers:

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"We, the jury, find for the plaintiff, and assess his damages at \$127."

INTERROGATORIES.

"1. Was the bridge in controversy in Madison township, Allen county, Indiana? Answer. Yes.

"2. Was not the bridge built with materials furnished by the township trustee, and work done by persons under the direction of the supervisor of the road district of said township, in which the same was situate? Ans. Yes.

"3. Were all the repairs on the bridge or its approaches made by the township or one of its officers? Ans. Yes.

"4. Did the county or the board of commissioners ever make any repairs on the bridge, or in any manner take charge of or assume the control or management of the bridge? Answer. No.

"5. How long was the bridge? Ans. Forty feet.

"6. Was it not a cheap bridge, on a road not used very much, and put by the persons in the neighborhood, and used by them also occasionally? Ans. Yes.

"7. Had not the plaintiff examined the bridge the day before, to see whether it was strong enough to bear the engine damaged? Ans. Yes.

"8. Was there any apparent defect in the bridge? Answer. No.

"9. What notice was ever given to the board of commissioners when in session, or to any member of the board when transacting the business of the board, that the bridge was out of repair? Ans. None.

"10. Was there any evidence to show that Madison township did not have funds out of which the same could have been repaired? Ans. No."

The defendant moved the court for judgment in its favor on the answers to the interrogatories. This motion was overruled, and the defendant's motion for a new trial was overruled. Judgment was rendered upon the verdict and the defendant appealed.

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The errors assigned, besides those already considered, are :

3. The court erred in overruling the appellant's motion for judgment notwithstanding the verdict.

4. The court erred in overruling the motion for a new trial.

There was no inconsistency between the general verdict and the answers to interrogatories. There was, therefore, no error in overruling the appellant's motion for judgment notwithstanding the verdict.

The reasons for a new trial were :

1. Permitting the witness, Francis Gladio, to testify to a conversation he had with Isaac Marquardt on the railroad, as to the unsafe condition of the bridge.

2. Refusing to strike out the testimony as to said conversation.

3. Refusing to permit the witness, John Weaver, to testify as to the conversation he had with Enoch J. Miller, in which he told Miller that the bridge was unsafe and rotten, the evening before, and the morning of the day when, the bridge broke and injured the engine.

4. The verdict is not sustained by sufficient evidence.

5. The verdict is contrary to law.

6. The damages are excessive.

7. Error in instructions Nos. 1 and 2 given by the court of its own motion.

The fourth, fifth and sixth of the foregoing reasons for a new trial are not discussed by the appellant's counsel in his brief, and are, therefore, regarded as waived.

The bill of exceptions shows that Francis Gladio was one of the county commissioners of Allen county, and had been such for eight years, and that at a time when he was not engaged in any business for the county, Isaac Marquardt met him on a railroad track and told him the bridge was about played out and not safe to travel, and asked him how they would have to go to work to get a new bridge, and witness replied, if the road superintendent had not the money, he

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should get a petition, have it signed by some of his neighbors and present it to the board of commissioners.

Gladio being a witness, the question was put to him by the appellee: "State what Mr. Marquardt said at that time in relation to this bridge?"

To this question the appellant objected because it was incompetent, irrelevant and immaterial, and because statements made to or notice given to the witness at such a time, he not then acting as commissioner, would not bind or be notice to the defendant, but the court overruled the objection and required the witness to answer. And this action of the court and the refusal of the court afterwards to strike out this testimony, are alleged as errors in Nos. 1 and 2 of the reasons for a new trial. If it was not necessary to prove express notice, then the testimony was mere surplusage and immaterial, and the admission of it was a harmless error. If it was necessary to prove express notice, then the testimony was both material and relevant, and it was not incompetent. *City of Lafayette v. Larson*, 73 Ind. 367, and cases there cited.

The third reason for a new trial was the exclusion of the testimony of John Weaver, a witness for appellant. It appeared in evidence that the appellee had employed one Weyburn to assist him in hauling the engine, and that the appellee had been threshing for Enoch Miller, and that Miller had agreed with Weyburn to help him haul the engine to its next working place. Weaver said, "I had a talk with my son-in-law Enoch J. Miller the evening before the accident and again that morning before he went to hitch on."

The appellant then put the following question: "State, Mr. Weaver, what you said to Mr. Miller at those conversations about this bridge, as to its being rotten or unsafe?" To this question the appellee objected, because Miller was not then in the employ of the appellee, and because there was nothing to show that either Miller or Weaver had told the plaintiff of the conversation. These objections were

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well taken. The testimony was inadmissible and properly excluded.

The first and second instructions, which, in the seventh reason for a new trial, are claimed to have been erroneous, are as follows:

"1. It is the duty of the board of commissioners of the county to exercise ordinary care and skill in the maintenance in a reasonable condition of repair of all bridges connected with and forming part of the legal public highways of this county.

"2. A road which has been used as such by the general public uninterruptedly in the same place for a period of fifteen years becomes thereby a public highway."

The first instruction must be taken in connection with the following part of instruction No. 3:

"In order to render the board of commissioners chargeable with the absence of ordinary care in the keeping of the bridge in question in repair, it is necessary that it shall be shown to your satisfaction that such board had notice or knowledge that the bridge needed or was out of repairs. For this purpose notice or knowledge on the part of one of the board while in office would be equivalent to notice to the board itself, but after receiving such notice such reasonable time as might be required to take the necessary steps to have the bridge repaired or travel thereon stopped would be allowed before liability would attach, and the board is chargeable with knowledge of the natural tendency of timber to rot and decay by lapse of time and exposure to the weather." There was no error in these instructions of which the appellant can complain. R. S. 1881, section 2892; *City of Lafayette v. Larson, supra*; *City of Indianapolis v. Scott, supra*.

The second instruction was not correct. It is not true, as matter of law, that a road becomes a public highway by uninterrupted user by the public for fifteen years. The statute provides that roads which have been so used for twenty years

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shall be deemed public highways, R. S. 1881, section 5035, and a highway may be established by user for a shorter time than twenty years if the circumstances warrant the presumption of a dedication by the owner of the land. This is a question for the jury. Greenleaf says: "The issue is therefore a mixed question of law and fact, to be found by the jury, under the direction of the court, upon consideration of all the circumstances. The length of the time of enjoyment furnishes no rule of law on the subject which the court can pronounce without the aid of a jury, unless, perhaps, where it amounts to twenty years; but it is a fact for the jury to consider, as tending to prove an actual dedication, and an acceptance by the public." 2 Greenl. Ev., section 662. *Hays v. State*, 8 Ind. 425; *Summers v. State*, 51 Ind. 201. But the error in instruction No. 2 was in this case a harmless one. There was uncontradicted evidence tending to show that the bridge was on a public highway opened and worked by the public and generally travelled, and that the bridge was built by the supervisor the first year the witness lived there, which was fifteen years ago or more, and that the father of the witness got up the petition for the highway, and that he died twenty or twenty-five years ago. The verdict, being clearly right upon the evidence, ought not to be reversed for such an error in the instructions. *Louisville, etc., R. W. Co. v. Grubb*, 88 Ind. 85.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

ZOLLARS, J., did not participate in the decision of this case.
Filed May 29, 1884.

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No. 10,849.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY v. JOHNSON.

RAILROADS.—Escape of Fire.—Contributory Negligence.—Complaint.—In a suit against a railroad company to recover for property destroyed by fire, the complaint must show by direct averment, that there was no negligence by the plaintiff contributing to the injury, and the allegation that the fire was suffered to escape without the fault of the plaintiff, is not sufficient.

PLEADING.—Facts, how Alleged.—In pleading under the code, facts must be shown by direct averment, and the statement of evidence, from which the necessary facts might be inferred by a jury, is not enough.

From the Fountain Circuit Court.

C. B. Stuart, W. V. Stuart, J. McCabe and C. M. McCabe,
for appellant.

C. V. McAdams, for appellee.

ELLIOTT, C. J.—It is settled by our decisions that a complaint for the recovery of damages resulting from the loss of property caused by negligence in suffering fire to escape from railroad locomotives, and to be communicated to adjoining property, must show, either by direct averment or by the facts stated, that the negligence of the plaintiff did not contribute to the injury. It is not enough to show that the defendant was negligent; it must also be made to appear that the plaintiff was without fault. *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Wilson v. Trafalgar, etc., G. R. Co.*, 83 Ind. 326.

In the complaint before us the allegation is that the fire was suffered to escape through the negligence of the defendant and without the fault of the plaintiff, but it is not averred that the loss resulted without any negligence of the plaintiff. The allegation of the pleading is confined to the act of suffering the escape of the fire, and by no rule of construction can it be extended to embrace the loss or injury. It may be true, as the complaint charges, that the fire did escape through

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appellant's negligence, and without any contributory negligence on the part of the appellee, and yet there be no right of action. The express averment falls far short of showing that the appellee was free from contributory negligence. It is one thing to aver that the fire escaped without the negligence of the plaintiff, and quite another to show that he did not contribute to the injury, for his contribution may have been in some matter occurring before or after the fire was suffered to escape. It is not sufficient to show freedom from negligence on one point out of several; the care incumbent upon the plaintiff must extend to all points material to his cause of action.

We can find nothing in the facts stated which shows that there was not contributory negligence on the part of the appellee. With the exception of the allegation that the fire escaped without any negligence on the part of the plaintiff, all the allegations of the pleading are directed to the negligence of the appellant; none of them touches upon the conduct of the appellee. It can not be inferred from the fact that the one was guilty of negligence that the other was not.

It may be true that the appellee was free from fault in suffering the fire to escape, and yet be true that his negligence contributed to the injury. It may be that he negligently exposed his property, or it may be that he could have extinguished the fire by a moment's exertion. It is incumbent upon the plaintiff, in all actions of this character, to show, in accordance with the rules of pleading, that he was free from fault contributing to the injury; it is not sufficient to show that in one particular he was without fault.

It is a familiar rule of pleading that facts, and not evidence, must be pleaded. It is also a well known rule that facts must be directly pleaded, and not stated by way of recital. *Jackson School Tp. v. Farlow*, 75 Ind. 118. There is an essential and important difference between the statement of a fact and the rehearsal of evidence. Suppose, for illustration, that the plaintiff should bring an action for the burn-

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ing of his barn, and should allege in his complaint that the defendant was seen near the barn immediately before the fire; that he had a lighted torch; that he was the plaintiff's enemy, and that the barn was destroyed by fire. No one could doubt that this evidence would supply ground for inferring, as an inference of fact, that the defendant did burn the barn, and yet no lawyer would contend that the statement of this evidence would constitute a valid cause of action. Many illustrations might be given showing the difference between pleading facts and evidence. Unless parties were required to affirm facts directly, the main purpose of pleading would be frustrated, for, as every one knows, the object of pleading is to evolve an issue, and that an issue is evolved by an affirmation of issuable facts on one side and their denial on the other. Matters of evidence are not admitted by a failure to deny them, but all material averments, not denied, are admitted, and, therefore, evidentiary matters are never material. It was the rule of the common law, and is the rule of the code, that mere matters of evidence are not admitted, although all material matters are admitted by a failure to controvert them. *Pomeroy Rem.*, sections 617, 668. It is, and always has been the rule, that a demurrer admits only such facts as are sufficiently pleaded, but matters of evidence are not sufficiently pleaded, and, therefore, matters of evidence are not admitted.

Our decisions upon the question of negligence in suffering fire to fall from locomotives and escape from the right of way of the railroad company recognize the distinction between pleading and evidence, and they rest firmly on the principles of law and logic. *Louisville, etc., R. W. Co. v. Ehler*, 87 Ind. 339; *Indiana, etc., R. W. Co. v. McBroom*, 91 Ind. 111. It would result in uncertainty and confusion to plead mere evidence, and leave all else to inference, and the purpose of pleading is to avoid this by presenting a certain, distinct and definite issue, so that the court and jury may know exactly what they are to try.

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There is an inherent, and not a mere artificial difference between pleading and evidence. There is likewise a plain distinction between inferences of fact and conclusions of law, and this distinction is a broad one, for inferences of fact the jury are charged with the duty of making, and conclusions of law it is the duty of the court to make. To break down the distinction would be to eradicate the line which separates the province of the court from that of the jury.

It may be, and probably is, true that where there is evidence making it probable that the plaintiff's carelessness did not contribute to the injury, the jury should infer that he was not guilty of negligence which contributed to the injury. That, however, is nothing to the point, for we are not concerned with a matter of evidence, but are dealing with a pleading. The cases recognize the right of the jury to make legitimate inferences from the evidence, and we have no disposition to question their soundness, even if it were proper to do so. *Louisville, etc., R. W. Co. v. Krinning*, 87 Ind. 351; *Pittsburgh, etc., R. W. Co. v. Jones*, 86 Ind. 496; S. C., 44 Am. R. 334; *Palmer v. Missouri, etc., R. W. Co.*, 76 Mo. 217; *Missouri Pacific R. W. Co. v. Kincaid*, 29 Kan. 654; *Sibitrad v. Minneapolis, etc., R. W. Co.*, 29 Minn. 58; *Lindsay v. Winona, etc., R. R. Co.*, 29 Minn. 411 (43 Am. R. 228).

The decisions in *Indianapolis, etc., R. R. Co. v. Paramore*, 31 Ind. 143, and *Pittsburgh, etc., R. R. Co. v. Nelson*, 51 Ind. 150, are not in point. In those cases it was alleged that the property was placed in a situation designated by a contract with the railroad company, and they were, therefore, within the rule, that a man who does what the railroad company directs him to do, is not guilty of contributory negligence. *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371; *Nave v. Flack*, 90 Ind. 205; *Lake Erie, etc., R. R. Co. v. Fix*, 88 Ind. 381.

The case of *Louisville, etc., R. W. Co. v. Krinning*, *supra*, is not in point, for the question arose upon the evidence, and it was said: "This question, so far as it was material in the case, was a question for the jury." The complaint in that case, it

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may be noted, contained the averment which is wanting in the present complaint. What we have said of the case just commented on applies to the case of *Pittsburgh, etc., R. W. Co. v. Jones, supra*, so far as it relates to matters of evidence, and in so far as it bears upon the question of pleading, it is only necessary to say that the question here presented was not there in controversy, for the complaint affirmed that the plaintiff's negligence did not contribute to the injury.

The trial court erred in overruling the demurrer to the complaint, and for that error the judgment must be reversed.

Filed May 28, 1884.

No. 10,847.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
v. JOHNSON.

RAILROAD.—*Fire Escaping from Locomotive.*—*Complaint.*—*Negligence.*—In an action by an adjoining proprietor against a railroad company for damage to the plaintiff's property caused by fire escaping from the defendant's locomotives, the complaint should not only allege negligence on the part of the defendant, but also that the plaintiff was without negligence.

From the Fountain Circuit Court.

G. B. Stuart, W. V. Stuart, J. McCabe and C. M. McCabe,
for appellant.

J. M. Rabb, C. V. McAdams, L. Nebeker and H. H. Dochterman, for appellee.

COLERICK, C.—This action was brought by the appellee against the appellant to recover, as damages, the value of certain property alleged to have been destroyed by fire occasioned by the negligence of the appellant. The complaint averred, in substance, that in the month of August, 1881, the appellant negligently permitted grass and rubbish to grow upon its right of way through the lands of the appellee, and negligently permitted the same to dry up and become com-

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bustible, and while in that condition the same was ignited by sparks and fire emitted by the engines of the appellant passing over its railroad, and that said fire was, through the negligence of the appellant, permitted to be carried to the appellee's premises adjoining said right of way, and destroyed appellee's fencing of the value of \$150, and his blue-grass pasture, of the value of \$300, all to appellee's damage \$550. Wherefore, etc.

A demurrer to the complaint, alleging insufficiency of facts, was overruled. An answer, consisting of two paragraphs, was filed. The first was a general denial. The second averred, in substance, that the appellant, in operating its line of railroad, uses engines propelled by steam, and that at the time alleged in the complaint the appellant was running its said engines upon said line of railroad in the usual and customary manner; and that said engines, at said time, were provided with spark arresters of the most approved patterns in known practical use, and that they were, at said time, in safe and proper condition; that during said month of August, 1881, owing to a long continued and unusual season of hot and dry weather, the grass and vegetation along said right of way became parched and dried up, and that in the ordinary running of appellant's engines in the then condition of the ground and vegetation, it was almost impossible to prevent the escape of sparks, and that if any injury was done to the appellee's property by reason of sparks escaping from said engines, then said injury occurred without any fault or negligence on the part of the appellant.

A demurrer was sustained to the second paragraph of the answer. The issues were tried by a jury, and resulted, over motions for a new trial and in arrest of judgment, in the rendition of a judgment in favor of the appellee. The errors assigned are the rulings of the court upon said demurrers and motions.

The appellant insists that the complaint is insufficient, 1st. Because it contains no allegation that the fire was communi-

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cated to the appellee's property by any fault or negligence of the appellant; and, 2d. Because it contains no allegation that the injury of which the appellee complains was caused without his fault or negligence.

It is true, as stated by this court in the case of the *Louisville, etc., R. W. Co. v. Ehlert*, 87 Ind. 339, that "The authorities recognize a well defined distinction between the negligent setting on fire of inflammable material on the right of way of a railroad company and negligence by the company in permitting such a fire to escape onto the land of an adjacent proprietor." In the case cited it was held that in an action like this it is necessary to aver that the railway company had negligently permitted the fire started on its right of way to escape and spread to the land of the plaintiff, upon the theory that negligence in so permitting the fire to escape constitutes the gist of the action. It is averred, in the complaint under consideration, that the fire, which ignited the dry grass and rubbish on the appellant's right of way across the lands of the appellee, was, *through the negligence* of the appellant, permitted to be carried to the appellee's premises adjoining said right of way, and caused the injury complained of. The complaint as to this averment was sufficient. See *Louisville, etc., R. W. Co. v. Krinning*, 87 Ind. 351; *Louisville, etc., R. W. Co. v. Hanmann*, 87 Ind. 422. A general allegation of negligence is sufficient, and under it the facts showing negligence may be proved. *Pittsburgh, etc., R. R. Co. v. Nelson*, 51 Ind. 150. But the complaint was insufficient in not showing that the injury was caused without the fault or negligence of the appellee. See *Wabash, etc., R. W. Co. v. Johnson*, *ante*, p. 40, where it was said: "It is settled by our decisions that a complaint for the recovery of damages resulting from the loss of property caused by negligence in suffering fire to escape from railroad locomotives, and to be communicated to adjoining property, must show, either by direct averment or by the facts stated, that the negligence of the plaintiff did not contribute to the injury. It is not enough to show that the de-

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fendant was negligent; it must also be made to appear that the plaintiff was without fault."

The court erred in overruling the demurrer to the complaint. The facts alleged in the second paragraph of the answer were admissible under the first paragraph of the answer. Therefore, if any error was committed by the court in sustaining the demurrer to the second paragraph, it was a harmless one. Where the general denial is pleaded, there is no available error in sustaining a demurrer to an additional paragraph which avers no fact not admissible under the general denial. *Phillip v. Aurora Lodge, etc.*, 87 Ind. 505; *Darrell v. Hilligoss, etc., Gravel Road Co.*, 90 Ind. 265.

In view of the conclusion which we have reached, it is unnecessary to consider the questions presented by the ruling of the court upon the motion for a new trial, as they may not arise on another trial. For the error of the court in overruling the demurrer to the complaint, the judgment should be reversed.

PER CURIAM.—The judgment of the court below is reversed at the costs of the appellee, and the cause is remanded with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings.

Filed May 29, 1884.

No. 10,384.

LANG V. OPPENHEIM.

PARTNERSHIP.—*Suit against Copartner.—Complaint.*—Even after dissolution, a suit by a partner against his copartner, to recover for an amount unadjusted due out of copartnership assets, will not lie until debts due it have been collected and those against it have been paid, unless there are none, or some disposition has been made of them, and a complaint not showing these facts is bad on demurrer.

SUPREME COURT.—*Record.—Verdict.—Good and Bad Paragraphs.*—Where there is a general verdict for the plaintiff, the complaint being in several paragraphs, one of which was good, and as to the others demurrers

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| 171 | 316 |

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were erroneously overruled, the judgment will be reversed unless it can be seen from the record that the verdict was solely upon the good paragraph.

From the Cass Circuit Court.

D. Turpie, M. Winfield and Q. A. Myers, for appellant.

S. T. McConnell and T. J. Tuley, for appellee.

BEST, C.—The parties to this action had been partners, and after the dissolution of the firm the appellee brought this suit to recover a balance alleged to be due him from the partnership affairs.

A demurrer was overruled to the first, second and third paragraphs of the complaint; issues were formed, a trial had and a judgment rendered for \$2,918.24. A motion to strike out the judgment and allow the finding to remain as a balance due until a final accounting was overruled and a receiver was appointed to close the affairs of the firm.

These rulings are assigned as error.

The third paragraph of the complaint avers "that the plaintiff and defendant were partners in business until May 1st, 1878; that during the existence of the partnership the defendant drew out of the concern the following amounts which he has never accounted for, and for which the plaintiff is entitled to recover off of the defendant, viz.: 1878, March. To lot of clothing taken from the firm to buy the Twelfth street property of O. R. Shroyer, \$2,500. August, 1876. The value of two houses and lots in Dykeman's third addition to Logansport, conveyed by plaintiff to defendant, \$2,500. August, 1876. To the home property of defendant, conveyed to him by the plaintiff, the consideration of which was put in at \$2,500, making the total amount of real estate taken by the defendant out of the firm for his own use, and not in any way settled or accounted for to the plaintiff, the sum of \$7,500, for which the plaintiff asks judgment against the defendant; that said sum is due and remains unpaid," etc.

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This paragraph is clearly insufficient. It fails to aver, either that the claims of the firm have been collected and its debts paid, or that none exist. It fails to aver that the claims, if any, are worthless, or that some disposition has been made of them. In the absence of all these averments, the paragraph was insufficient, as has often been decided by this court. *Page v. Thompson*, 33 Ind. 137; *Cobble v. Tomlinson*, 50 Ind. 550; *Crossley v. Taylor*, 83 Ind. 337; *Meredith v. Ewing*, 85 Ind. 410.

The first paragraph of the complaint also omits to aver that the claims of the firm have been collected or otherwise adjusted, and that its debts have been paid, or that none exist, and for the want of these averments this paragraph was also insufficient.

The second paragraph of the complaint was unlike the others. It averred the existence of such partnership from the 1st day of March, 1867, until the 1st day of May, 1878; that during said time said firm accumulated \$10,000 worth of real estate, and that the stock of goods and outstanding claims at the time of dissolution amounted to \$25,000; that "in the dissolution they agreed to and did select Solomon Fisher to adjust all matters of a personal character, and settle all their matters except the real estate; that said Fisher accepted such trust and took charge of the books and accounts, examined the same, and, leaving out the real estate, there was found due the plaintiff from the defendant the sum of \$5,000, which the defendant agreed to pay the plaintiff; that the defendant took the real estate owned by the firm, valued at \$5,000, none of which he has accounted for to the plaintiff, and that there is due the plaintiff by reason thereof the sum of \$10,000, for which he demands judgment."

The averment in this paragraph, that the defendant took real estate of the firm, valued at \$5,000, adds nothing to it, as it does not appear that the affairs of the firm had been finally adjusted. If the claims were uncollected and the debts unpaid, the plaintiff could not recover a judgment for the real

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estate taken. This is too plain for discussion, as the plaintiff may reimburse himself from uncollected claims, and the defendant may be compelled to pay the value of the real estate upon the firm debts. Indeed, its value may not equal his share after final settlement, and, therefore, under these circumstances, the plaintiff could not maintain an action for such real estate. Nor does the promise of the defendant render the paragraph sufficient. It is not averred that it was made for a balance due upon a final adjustment. The averment is that Fisher, in the dissolution, "took charge of the books and accounts, examined the same, and, leaving out the real estate, there was found due the plaintiff from the defendant the sum of \$5,000, which the defendant agreed to pay," etc. This is not an averment that Fisher collected the claims, paid the debts, and found, upon final adjustment, that there was due the plaintiff \$5,000. If, upon an examination of the books and papers, without a final adjustment, \$5,000 was found due the plaintiff, the defendant's promise to pay it was necessarily dependent upon the final adjustment of the partnership affairs, as, if upon such adjustment nothing should be due him, he could not recover notwithstanding such promise. If nothing should be due the plaintiff, no consideration would support his promise, and, therefore, the paragraph should have averred that the amount found due was upon final adjustment. For the want of these averments the paragraph was insufficient.

The fourth and remaining paragraph of the complaint is not assailed, and, of course, is deemed sufficient. This fact, however, can not prevent a reversal of the judgment, as the finding is general and does not appear to be based solely upon such paragraph of the complaint. In such case, an error committed in overruling a demurrer to a defective paragraph of the complaint will reverse the judgment. This is the settled practice of this court. *Evansville, etc., Co. v. Wildman*, 63 Ind. 375; *Pennsylvania Co. v. Holderman*, 69 Ind. 18.

The appellee contends that these paragraphs are sufficient to require an accounting, and, if good for any purpose, no er-

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ror was committed in overruling the demurrer to them. This version will not save the judgment. If only sufficient for such purpose, he was not entitled to the judgment recovered, and the appellant's motion to strike it out should have been sustained. These paragraphs, however, were evidently not framed, nor was the action prosecuted, upon any such theory. The purpose was to obtain a judgment and not an accounting. The fact that a receiver was appointed does not change the character of the action. It was somewhat singular to appoint a receiver to close the affairs of the firm, and at the same time render a judgment in favor of one partner against the other, but neither of these things can change the real character of the proceeding, or render unnecessary essential averments in the pleadings.

The demurrer to each of these paragraphs of the complaint should have been sustained, and for the error in overruling it the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs, with instructions to sustain the demurrers to the first and third paragraphs of the complaint, with leave to amend.

HAMMOND, J., did not participate in the decision of this cause.

Filed May 29, 1884.

No. 9441.

TURNER v. CITY OF INDIANAPOLIS.

SUPERIOR COURT.—*Appeal.—Estoppel.—Waiver.*—From the action of the court in general term reversing the judgment at special term, and remanding the cause, a party prayed an appeal to the Supreme Court, but filed no bond. Afterwards he appeared at special term, where the mandate of the general term was executed by sustaining a demurrer to his complaint, and, declining to amend, he excepted. He then, within the time allowed by law, perfected his appeal to the Supreme Court from the judgment at general term by filing a transcript.

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| 167 | 89 |
| 167 | 209 |

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Held, that the action of the appellant at special term did not waive or estop the appeal prayed.

NEGLIGENCE.—City.—Co-servants.—The rule that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant is not applicable to a suit against a municipal corporation.

SAME.—Streets.—A fireman, in assuming the duties of his place, takes upon himself no risk arising out of negligence on the part of those in charge of the streets.

SAME.—Complaint.—Notice.—In a complaint against a city for an injury caused by an obstruction in a street, it is not enough to allege that the city had negligently left the obstruction in the street, but it must also appear that it had notice of the obstruction, or that it ought to have had such notice.

From the Superior Court of Marion County.

W. W. Herod and F. Winter, for appellant.

C. S. Denny and D. V. Burns, for appellee.

FRANKLIN, C.—This case was tried in the special term of the superior court, which resulted in a judgment for the appellant. The case was appealed to the general term, and the judgment of the special term was reversed, for the reasons that the complaint was insufficient, and the evidence did not sustain the verdict of the jury. The cause was remanded to the special term with instructions for further proceedings in accordance with the opinion reversing the judgment. An appeal was prayed to the Supreme Court, but no bond was filed. This was on the 8th day of June, 1880.

On the 8th day of November, 1880, the parties appeared in special term, and, on the motion of appellee, in accordance with the opinion in general term, the demurrer to the complaint theretofore filed was by the court in special term sustained; appellant excepted. And on the 10th day of December, 1880, at the next term of the special term of said court, the parties again appeared, and the plaintiff declined to plead further, and elected to stand on the ruling to the demurrer heretofore made. Whereupon judgment was rendered upon the demurrer for the defendant for costs.

The plaintiff, instead of again appealing the case to the

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general term, on the 12th day of May, 1881, filed a transcript of all said proceedings in this court, assigning as error thereon the reversal by the general term of the judgment first rendered by the special term.

Appellee objects to this court considering the case, and insists that the appeal ought to be dismissed. Upon the reversal of the judgment by the general term, the cause was regularly remanded to the special term, with instruction for further proceedings in accordance with the opinion. The plaintiff had choice of two proceedings, either to perfect his appeal to the Supreme Court, or go back to the special term for further proceedings. It is insisted that he elected to go back to the special term; and when he, without objection, voluntarily appeared at the subsequent special term, and the parties submitted the previous demurrer to the complaint to the court for decision, and the plaintiff excepted to the decision on the demurrer, and at a subsequent term of said special term again appeared in the case and declined to further plead, and, as the record shows, elected to stand on the ruling upon the demurrer, that he abandoned and waived his appeal to the Supreme Court, and elected to take his chances in further proceedings in the special term, and afterward was estopped from perfecting his said appeal to the Supreme Court; that the only way then to get into the Supreme Court was to again appeal to the general term, and through it come to the Supreme Court. And it is insisted by appellant that the statute gives him one year in which to perfect his appeal to the Supreme Court, and having given notice of his intention to do so, by praying an appeal at the time of the reversal of the judgment by the general term, no subsequent proceedings of the special term could cut off the right to perfect his appeal within the time given therefor by the statute.

Bigelow, in his work on estoppel, p. 562, lays down the rule to be, that "A party can not either in the course of litigation or in dealings *in pais* occupy inconsistent positions; and where one has an election between several inconsistent courses of ac-

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tion he will be confined to that which he first adopts. Any decisive act of the party done with knowledge of his rights and of the facts determines his election and works an estoppel."

Upon the reversal of the judgment by the general term, the first decisive act done by the appellant in this case was to pray an appeal to the Supreme Court. After that he had one year to perfect such appeal in. When the case went back to the special term, had appellant amended his complaint, or done any other decisive act evincing an intention to further proceed with his case in the special term, it would have been construed as an abandonment of his appeal to the Supreme Court, and a waiver of his right to afterwards perfect such appeal. But the mere excepting to the action of the court, in carrying out the judgment of the general term, and his afterwards declining to further plead, and electing to stand upon his complaint, evinced rather an intention to prosecute his appeal to the Supreme Court than to abandon it. We do not think that the subsequent proceedings in the special term cut off appellant's right to perfect his appeal from the reversal of the judgment by the general term. The case is properly in this court for decision, and the appeal ought not to be dismissed.

The first question presented is as to the sufficiency of the complaint, which, in substance, alleges that on the 27th day of October, 1877, appellee was an incorporated city under the general law of the State of Indiana; that appellant was on said last mentioned date employed in the fire department of said city, and, under his employment, it was his duty to drive the chief engineer of the fire department to all fires as speedily as possible; that on said date above mentioned, while engaged in the line of his duty as aforesaid, in driving the chief engineer to a fire, and going at a rapid rate, as it was necessary and proper he should do, he drove upon and against a large rock which the said defendant had negligently suffered and permitted to be and remain in and upon the roadway of

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Lafayette Railroad street, which was then and there a public street of said city, at and near the intersection of North street, and came violently into collision with said rock, by which the buggy in which plaintiff was seated was overturned, and plaintiff thrown therefrom to the ground with great force.

The complaint concludes with appropriate allegations as to the character of the injuries received and the damages sustained.

Appellee insists that the complaint is bad for the reason that appellant can not recover for injury caused by the negligence of the officers and agents of the city having supervision of her streets, because of the rule exempting a master from liability to a servant on account of the negligence of a co-servant.

While such a rule is admitted to exist, and doubtless ought to be applied to appropriate cases, we do not think that it can be correctly applied to the case under consideration. For negligently failing to keep a public street in repair or to remove obstructions therefrom, a city can not shield itself behind the negligence of its officers or agents whose special duty it might be to repair streets or remove obstructions. The State has delegated the power to and enjoined such duty upon the city as a corporation, and it must see that the duty is performed by its officers and agents.

Municipal corporations, as to the streets within their limits, owe to the public the duty to keep them in a safe condition for use in the usual mode by travellers, and are liable in a civil action for special injuries resulting from neglect to perform this duty. *Dillon Mun. Corp.*, section 780; *City of Lafayette v. Larson*, 73 Ind. 367; *City of Crawfordsville v. Smith*, 79 Ind. 308 (41 Am. R. 612); *City of Logansport v. Dick*, 70 Ind. 65 (36 Am. R. 166); *Town of Elkhart v. Ritter*, 66 Ind. 136; *City of Indianapolis v. Gaston*, 58 Ind. 224; *Grove v. City of Fort Wayne*, 45 Ind. 429 (15 Am. R. 262); *Higert v. City of Greencastle*, 43 Ind. 574. In this class of cases, the negligence of the officer or agent becomes

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the negligence of the city, the same as notice to the officer or agent is notice to the city. It is through and by officers and agents that the corporation performs such duties. Nor do we think that the rule applicable to private corporations, such as railroads, etc., that the master is not liable for injuries caused by the negligence of a co-servant, can be applied to officers and agents of municipal corporations. If the rule in any case can be made applicable to such officers and agents, it can not be made to apply when they are acting in entirely different departments of the municipal government. We can not see wherein there is any co-service to be performed between members of the fire department and members of the street department, to which the rule could be applied to the case under consideration. A member of the fire department has no servitude connection whatever with the repairing of the streets, or the removal of obstructions therefrom, and we do not think he can in any sense be called a co-servant with the street commissioner or any other officer or agent of the city having charge of the streets. They are to each other, in so far as servitude is concerned, entire strangers, and a fireman, in assuming the duties of his position, takes upon himself no risks arising out of the negligence of those in charge of the streets.

But we think the question of co-servants is not properly raised by this demurrer. The complaint charges that the defendant had negligently suffered and permitted the large rock to be and remain in and upon the roadway of the street, thus charging the negligence "directly upon the defendant itself, and not merely upon its employees." And this has been held sufficient on demurrer. See the case of *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134), and the authorities therein cited.

A city may be held liable for negligence, even at the suit of an employee. *City of Lafayette v. Allen*, 81 Ind. 166. But while the city may be made thus liable, the complaint must state facts sufficient to show its liability.

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This complaint does not charge the defendant with placing the obstruction in the street, but with negligently suffering and permitting it to be and remain there. This would be a sufficient charge of negligence against a private corporation, such as a railroad company, etc., for the obstruction of a public highway in the use of its franchise. But does the same rule obtain as to municipal corporations? While it may be difficult to give an entirely satisfactory reason for a difference, yet the authorities seem to make a difference, and it appears to be based upon the reason that municipal corporations act in behalf of the public, and, having no individual interest, such strict vigilance is not required. While private corporations acting for their own individual interest, by the permission of the public, are required to exercise a higher degree of vigilance, in order to protect the rights of the public.

Dillon on Municipal Corporations, sec. 790, says: "Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation (not acting through independent contractors, the effect of which will be considered presently), no question has been made, or can reasonably exist, as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care. * * * * Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others, but as, in such case, the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." For, in such cases, "the corporation, in the absence of a controlling enactment, is responsible only for a reasonable diligence to repair the defect or prevent accidents after the unsafe condition of the street is known, or

ought to have been known to it, or to its officers having authority to act respecting it." See authorities cited in note 1 in support thereof.

From the great array of authorities above referred to in said note, there can be no doubt but the plaintiff, before he can recover in an action of this kind, must prove that the defendant had knowledge, notice, or that which is equivalent to notice, the continuance of the obstruction so long that it ought to have known of its existence, and had a reasonable time to remove the same. If notice is absolutely necessary to be proven in order to create a liability, why is it not necessary to be alleged in the complaint? This complaint alleges nothing of the kind, does not show how long the rock remained in the street before the accident, or that the defendant or any of its officers or agents had any knowledge or notice of its existence in the street.

In the case of *Worster v. Proprietors of Canal Bridge*, 16 Pick. 541, it was held by the court that the first count in the complaint was insufficient for the reason that it contained no averment that the defendant had reasonable notice of the defect of the bridge.

The case of *City of Fort Wayne v. DeWitt*, 47 Ind. 391, was a case for an injury received by falling into an excavation in a sidewalk as a part of a cellar excavated preparatory to the improvement of an adjacent lot. It was originally commenced against the owner of the lot and the city, and was afterwards dismissed as to the owner of the lot. The charge in the complaint was, that "on the — day of —, 1868, the said defendants negligently left said excavations in said sidewalk uncovered and without any guards or lights to prevent persons from falling into said excavations and into said cellar, while passing along said sidewalks; and the plaintiff," etc. The city was not charged with making the excavations, but negligently leaving them in the sidewalk uncovered and unprotected. And the following language is used in the opinion of the court: "In our opinion, the complaint

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was fatally defective for failing to charge the appellant with negligence. * * * It is not alleged that the city or its officers had any notice of the condition of said excavations; nor are any facts stated from which notice might reasonably be inferred. There is no averment as to the length of time such excavations were left open and unprotected. For aught that appears in the complaint, it may have been only for a single hour or a day. In our opinion, the complaint should have alleged that the appellant had notice, or such facts should have been stated, from which notice might have been reasonably inferred." The complaint was held bad, and for this error the judgment was reversed.

The case under consideration more strongly requires the complaint to aver notice, or the statement of such facts from which notice could be reasonably inferred, than the case above referred to. The excavations would necessarily take some time to make them, and a better opportunity would be afforded the city to learn their true condition than would the momentarily dropping of a rock in the street. This may have been done on the same evening of the accident complained of, and but a few moments before its occurrence, without any opportunity whatever for the city or any of its officers to learn anything about its existence in the street.

Notwithstanding this court has held that a general charge of negligence in a railroad company is sufficient without averring notice, yet we think that in order to hold a municipal corporation liable for negligently failing to repair a street, or remove an obstruction therefrom, it must have notice of the want of repair or the existence of the obstruction, and it must either be averred in the complaint, or such facts stated from which it can be reasonably inferred.

The difference between a railroad company and a municipal corporation in this respect may be illustrated thus: Where a railroad track crosses a public street or highway, the railroad company, by some of its officers or employees, is presumed to be in continuous operation of business on

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the track, and is at all times presumed to have, and is chargeable with, notice of any obstructions upon its track within the street or highway, and is required to keep the same clear save the necessary time for the transaction of its business. The city, by its officers or agents, are not hourly and daily traversing all its various public streets, and therefore is not presumed to have the same facilities for knowledge of obstructions in the streets, and is not chargeable with notice, until it has either been brought home to it, or a sufficient time has elapsed in which it should have learned the facts. *Dewey v. City of Detroit*, 15 Mich. 306.

All the cases referred to by appellant's counsel, in which the complaints have been held good without the averment of notice, are railroad cases, and we do not think that they are applicable to cases against municipal corporations, at least in this class of cases. While the want of notice appears to be a defence for a railroad company, and may be shown by the evidence, notice appears to be a necessary charge against a municipal corporation, and must be averred, or equivalent facts stated in the complaint, and proved upon the trial.

As the complaint must be held bad for the want of an averment of notice or its equivalent, it is unnecessary to investigate and decide the reasons for a new trial.

The judgment of the general term reversing the judgment of the special term ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the general term be and it is in all things affirmed, at the costs of appellant, and that the cause be remanded to the court below, with instructions for further proceedings in accordance with this opinion.

ELLIOTT, J., did not participate in the decision.

Filed Nov. 28, 1883.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellant urges two reasons for a rehear-

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ing. The first is that in the opinion deciding the case, this court places the affirmance of the judgment of the lower court at general term, reversing the judgment at special term, upon a different ground from the one upon which the court at general term reversed the judgment at special term.

We do not understand that the judgment, or the grounds upon which it is based, of the lower court in general term, become the law of the case so as to be binding upon this court in an appeal to this court from such judgment; if so, no such appeal would be provided for.

The second reason is that this court erred in holding that a general charge in the complaint of negligence in the defendant, without averring notice of the obstruction in the street, or alleging facts from which notice might be inferred, was insufficient; that the lower court in special term erred in overruling the demurrer to the complaint, and that there was no error in the reversal of the judgment at the general term.

For aught that appears in the complaint, the obstruction complained of may not have been in the street five minutes before the accident. And before the city can be held liable for not removing the obstruction from the street, it must be shown by averments in the complaint, that it had notice of the existence of the obstruction in the street, and, that a reasonable time had elapsed, before the accident, for the removal of the same, or that it had remained there so long as to justify the presumption of such notice. This rule we think is based upon authority, and is in accordance with justice and common reason.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled, at appellant's costs.

Filed May 29, 1884.

The Wabash, St. Louis and Pacific Railway Company v. Johnson.

No. 10,848.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
v. JOHNSON.

RAILROADS.—*Escape of Fire.*—*Negligence.*—*Complaint.*—A complaint against a railroad company, charging that the defendant negligently and without fault of the plaintiff, allowed fire to escape from its locomotive, whereby the plaintiff's property was burned, is bad on demurrer, because it does not show that the plaintiff's negligence did not contribute to the injury.

From the Fountain Circuit Court.

C. B. Stuart, W. V. Stuart, J. McCabe and C. M. McCabe,
for appellant.

C. V. McAdams, for appellee.

ELLIOTT, C. J.—The complaint in this case is very similar to the complaint in the case of the *Wabash, etc., R. W. Co. v. Johnson, ante*, p. 40. It charges the appellant with negligently suffering fire to escape from its locomotives, and to ignite and burn property belonging to the appellee. The only averment upon the subject of contributory negligence is confined, by the language employed by the pleader, to the act of allowing fire to be emitted from the locomotive; there is no averment that the injury did not occur through plaintiff's negligence. We held in the case cited, that it was not sufficient to aver that the escape of the fire was not attributable to the plaintiff's fault, but that it must appear from the facts stated, or by express averment, that the plaintiff's fault did not contribute to the injury, and that decision rules the present case.

It is now firmly settled that the complaint in cases of this class must show that there was negligence in allowing the fire to be dropped upon the track, and in allowing it to escape from the right of way of the railroad company. *Pittsburgh, etc., R. W. Co. v. Culver*, 60 Ind. 469; *Pittsburgh, etc., R. W. Co. v. Hixon*, 79 Ind. 111; *Louisville, etc., R. W. Co. v. Ehler*, 87 Ind. 339; *Indiana, etc., R. W. Co. v. Adamson*, 90

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Ind. 60; *Indiana, etc., R. W. Co. v. McBroom*, 91 Ind. 111. It is, therefore, clear that it is not enough to show that the fire was emitted from the locomotive without the plaintiff's fault. That may have happened, and it still be true that his fault contributed to the injury.

Counsel in this case, as in the case of *Wabash, etc., R. W. Co. v. Johnson, supra*, confound matters of pleading with matters of evidence, but it must be plain to any one upon reflection that there is a marked and important difference. Having fully discussed that question in the case cited, we do not deem it necessary to again discuss it.

The complaint in *Louisville, etc., R. W. Co. v. Lockridge*, 93 Ind. 191, was quite as full in its statements of facts, and it was held, and, as we are satisfied, correctly, to be insufficient. The demurrer to the complaint should have been sustained.

Judgment reversed.

Filed May 28, 1884.

No. 11,563.

SARGENT v. THE STATE.

CRIMINAL LAW.—Escaped Convict.—Dismissal of Appeal.—Supreme Court.—

When it is shown to the Supreme Court that an appeal there pending is prosecuted in the name of a convicted defendant, who has escaped from legal custody and is at large, the appeal will be dismissed.

From the Fulton Circuit Court.

I. Conner, for appellant.

F. T. Hord, Attorney General, *E. C. Martindale*, Prosecuting Attorney, *W. B. Hord* and *W. W. McMahan*, for the State.

Howk, J.—In this case the appellant, Sargent, was indicted, tried by a jury, and found guilty of the felony which is defined in section 1935, R. S. 1881. Over his motions for a new trial and in arrest of judgment, the court adjudged in accord-

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ance with the verdict, on the 1st day of March, 1884, that he, George M. Sargent, be confined in the State prison north for the term of two years; that he be disfranchised and rendered incapable of holding any office of trust or profit for the space of two years; and that he pay to the State of Indiana a fine in the sum of \$20, and the costs of this prosecution. On the same day he prayed an appeal to the Supreme Court, which was granted, and sixty days were given him in which to prepare and file his bill of exceptions. This bill was accordingly signed by the judge, and filed on the 13th day of March, 1884, and within the time given.

On the 2d day of April, 1884, the record of this cause and an assignment of errors endorsed thereon, in the name of George M. Sargent as appellant, were filed in this court.

The first matter which requires our attention in this case is the motion of the attorney general, on behalf of the State, to dismiss the appeal. This motion is founded on an affidavit, in substance, as follows:

“William T. Butler, being duly sworn, says that he is now, and has been for more than three years last past, the sheriff of said Fulton county, Indiana; that, as such sheriff, he had charge of the above named defendant, George M. Sargent, who was, at the February term of said Fulton Circuit Court, convicted of receiving stolen goods and was duly sentenced by the court to be confined in the State prison north for the space of two years; that, on the 4th day of March, the clerk of said Fulton Circuit Court issued and delivered to him, as such sheriff, an order to take said George M. Sargent to said prison; that, on the 11th day of March, 1884, while this affiant was preparing to take said Sargent to said prison, the said George M. Sargent escaped and has never been seen by this affiant or by any of his deputies; that he never has been confined in said prison, under said order, and that he, the said George M. Sargent, is now at large as an escaped convict.”

This affidavit was subscribed and sworn to, on the 18th

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day of April, 1884, and it and the motion of the attorney general were filed in this court, on the 22d day of April 1884.

The question presented for decision, by the motion of the attorney general on behalf of the State, in this case, is a new one in this court; although the like question has often been considered and decided by other courts of last resort. It will be observed that it is shown by the affidavit of the sheriff of Fulton county, upon which the motion to dismiss is founded, that the appellant, Sargent, escaped from his custody on the 11th day of March, 1884, and is at large as an escaped convict. He was not, therefore, in the custody or under the control of the trial court or its officers, at the time the bill of exceptions appearing in the record was signed and filed on the 13th day of March, 1884, or at the time notice of this appeal was served, as required in section 1887, R. S. 1881, on the clerk and prosecuting attorney on the 12th and 13th days of March, 1884, respectively. The appellant's attorney on the trial of the cause, in the circuit court, has appeared to the motion filed by the attorney general, in this court; but he has not attempted to controvert any of the facts stated in the affidavit, upon which such motion is founded. It must be taken as true, therefore, that the defendant, Sargent, before and at the time this appeal was attempted to be taken, was and still is at large as an escaped convict, and that such attempted appeal, though nominally taken by him and in his name, was in fact taken by the attorney who appeared for and represented him during the progress of the cause in the court below.

His attorney relies upon the provisions of section 1881, R. S. 1881, as fully authorizing this appeal. In that section it is provided as follows: "An appeal to the Supreme Court may be taken by the defendant as a matter of right, from any judgment in a criminal action against him, in the manner and in the cases prescribed herein; and, upon the appeal, any

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decision of the court or intermediate order made in the progress of the case may be reviewed."

Doubtless, this is the law; and if the defendant in this case had remained in the custody of the law, he might have prosecuted this appeal, and had the judgment of the court and all intermediate orders against him reviewed by this court. But he can not unlawfully escape from the custody of the law, and, while he is at large as an escaped convict, claim the right to have an appeal prosecuted in his name, and thus obtain a review by this court of the judgment and orders against him, in the trial court. It may well be doubted, we think, whether this appeal was legally taken in the name of the defendant, Sargent, when it appears, as it does, that all the steps required by the statute, in taking an appeal in a criminal action, were taken in this case after his escape from the custody of the law. Section 1887, R. S. 1881. But, waiving this point, we are convinced that it is no part of our duty, as an appellate court, to entertain the appeal of the defendant, Sargent, in this case, and review the decision and orders or rulings, of which he complains, while he is at large as an escaped convict. In the language of Chief Justice WAITE, in *Smith v. United States*, 94 U. S. 97, we may say, in the case in hand, of the defendant, Sargent: "If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be only a moot case."

It is the constitutional right of the accused, in all criminal prosecutions, "to be heard by himself and counsel;" but it must be held, we think, that he has no right to appear by counsel alone, after he has escaped from lawful custody and is at large. Such has been the uniform holding of the courts of last resort in other jurisdictions, and it meets our full approval. *Sherman v. Commonwealth*, 14 Grat. 677; *Leftwich v. Com.*, 20 Grat. 716; *Commonwealth v. Andrews*, 97 Mass. 543;

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People v. Genet, 59 N. Y. 80 (17 Am. R. 315); *Queen v. Caudwell*, 17 Q. B. 503; *People v. Redinger*, 55 Cal. 290 (36 Am. R. 32).

The motion of the attorney general, on behalf of the State, to dismiss the appeal in this case, ought to be and must be sustained.

The appeal is dismissed, with costs.

Filed June 4, 1884.

 No. 10,982.

THOMPSON v. DEPREZ ET AL.

SUPREME COURT.—*Rule 19.*—*Waiver of Compliance with.*—The right of a party to a literal compliance with Rule 19 of the Supreme Court must be claimed before submission of the cause by agreement.

SAME.—*Evidence.*—*Harmless Error.*—The admission of evidence which can not possibly injure the opposite party is, if erroneous, harmless.

HIGHWAYS.—*Evidence.*—*Witness.*—*Opinion.*—The opinion of a witness as to the public utility of a proposed change of a highway is not admissible as evidence.

From the Shelby Circuit Court.

T. B. Adams and *L. T. Michener*, for appellant.

E. K. Adams, *L. J. Hackney* and *O. J. Glessner*, for appellees.

FRANKLIN, C.—Appellee Deprez and others filed a petition before the board of commissioners for the change of a public highway. Upon a favorable report of viewers, appellant filed a remonstrance, for the want of public utility, and claiming damages if the change should be made. Reviewers reported in favor of the public utility, and assessed to appellant \$15 damages, upon which the county board ordered the change to be made, and appellant appealed to the circuit court, where the case was tried by a jury; a verdict was returned in favor of the petitioners, and in favor of remonstrant for \$25 damages. Over a motion for a new trial, judgment was rendered upon the

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Thompson v. Deprez *et al.*

verdict, and the remonstrant appealed to this court. The only error assigned is the overruling of the motion for a new trial.

On the 14th day of May, 1884, appellees with their brief filed a motion to dismiss the appeal, for the reason that the nineteenth rule of this court had not been complied with, by numbering all the lines of each page of the bill of exceptions, and placing marginal notes thereon designating the names of the witnesses.

The lines are numbered in the transcript of the pleadings and record, and in the parts of the bill of exceptions referred to by appellant in his brief, and the bill of exceptions containing the evidence is preceded by a general index containing the names of the witnesses and the pages upon which their evidence may be found. The cause was submitted by agreement endorsed upon the record March 1st, 1884. We think after appellees agreed to submit, without a full compliance with the rule, there was a sufficient compliance to prevent a dismissal of the appeal.

Among the twenty-eight reasons stated for a new trial, appellant first insists upon the fourth, which is that the court erred in permitting the plaintiff to introduce in evidence proof of the posting up of notices of the pendency of the petition.

This proof was entirely unnecessary; there had been an appearance before the board of commissioners without any objections to the notice, and there was no issue pending in the circuit court that required such proof. *Green v. Elliott*, 86 Ind. 53; *Breitweiser v. Fuhrman*, 88 Ind. 28; *Rominger v. Simmons*, 88 Ind. 453. But this evidence, although immaterial, could not possibly do appellant any harm, and, therefore, can not be a cause for reversing the judgment.

The next reason insisted upon is the overruling of an objection to the following question put to the witness Webster, and answer thereto:

"State whether or not in your opinion, upon the facts stated by you, the proposed change of highway would be of public

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utility? Answer. I think it would be of public utility to change the road and locate it upon the line."

The question as to the admissibility of such testimony was thoroughly discussed and fully considered by this court in a case very similar to the one under consideration, to wit, the case of *Yost v. Conroy*, 92 Ind. 464. We regard this question as being settled by this court in that case in favor of appellant's position. In that case the judgment was reversed on account of the introduction of such testimony, and so must it be in this case. See, also, *Indiana, etc., R. W. Co. v. Hale*, 93 Ind. 79; *Dillman v. Crooks*, 91 Ind. 158.

It is unnecessary to discuss and pass upon the other reasons stated for a new trial, as they may not arise in a subsequent trial.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at appellees' costs, and that the cause be remanded, with instructions to the court below to sustain the motion for a new trial, and for further proceedings.

Filed June 4, 1884.

No. 10,555.

KEEN v. BRECKENRIDGE, RECEIVER.

RECEIVER.—*Right to Sue.*—*Complaint.*—A complaint against a receiver as such, upon a money demand, which does not allege that leave to bring the suit has been granted by the proper court, is bad on demurrer.

From the Dearborn Circuit Court.

R. E. Slater, F. Adkinson, A. W. Gaines and O. M. Wilson,
for appellant.

COLERICK, C.—The appellant filed a complaint against the appellee, in which it was averred that on the 24th day of June, 1879, and continuously thereafter until the 1st day of February, 1881, he and one Louisa R. Willette were

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| 96 | 69 |
| 134 | 673 |
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| 158 | 679 |

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partners, doing business under the firm name and style of George W. Keen & Co.; that during all of said time said Louisa R. Willette was a married woman, and that said firm and all its business had been carried on as to her with her own capital, means and estate as her own separate trade and business; that on and during the dates mentioned he deposited with said firm various sums of money, amounting, in all, to \$5,000; that the money so deposited was his property, and that by the terms of said co-partnership she was to furnish all the money or funds required to carry on said business; that the money so deposited was a loan by him to said firm, and was used in and about its business, and remained unpaid. A bill of particulars, showing the amounts of the money loaned, was filed with the complaint as a part thereof. Wherefore he prayed judgment against the appellee, as such receiver, for said sum, and other relief. To this complaint a demurrer was sustained, and thereupon the appellant filed two additional paragraphs of complaint, which were numbered two and three. The second paragraph was, in substance, the same as the first or original paragraph of the complaint, except that it alleged, in addition thereto, that said firm was, on the 1st day of February, 1881, dissolved by the mutual agreement of said partners, and from that time ceased to do business, and that the appellee, as such receiver, had in his hands all the property, rights, moneys, credits and effects of said firm, and demanded judgment against the appellee, as such receiver, for the amount of the money so loaned, viz., \$5,000, to be paid by said receiver out of any moneys in his hands liable for its payment. The third paragraph was, in substance, the same as the second paragraph, except that it averred that no part of the money so loaned had gone to the individual use or benefit of said Louisa R. Willette, and that it had not been contributed or advanced to the firm as a part of the capital stock thereof, but had been loaned to the firm for its temporary use. The prayer for relief was the same as that set forth in the second paragraph. To both of these additional para-

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graphs demurrers were sustained, and, the appellant refusing to amend, final judgment, on demurrer, was rendered against him. The errors assigned are the rulings upon said demurrers.

No brief has been filed by the appellee. We are informed by the appellant, in his brief, that the demurrers were sustained because the several paragraphs of the complaint, above set forth, failed to aver that the action was brought by leave of the court appointing the appellee such receiver.

In High on Receivers, section 254, it is said: "A receiver being an officer of the court, acting under its direction, and in all things subject to its authority, it is contrary to the established doctrine of courts of equity to permit him to be made a party defendant to litigation, unless by consent of the court. And it is in all cases necessary that a person desiring to bring suit against a receiver in his official capacity, should first obtain leave of the court by which he was appointed, since the courts will not permit the possession of their officers to be disturbed by suit or otherwise, without their consent and permission. The rule is established for the protection of receivers against unnecessary and expensive litigation." See, to same effect, *DeGroot v. Jay*, 30 Barb. 483; *Higgins v. Wright*, 43 Barb. 461; *Barton v. Barbour*, 3 MacArthur, 212 (36 Am. R. 104); *Barton v. Barbour*, 104 U. S. 126. The case of *Barton v. Barbour*, 3 MacArthur, 212, above cited, was an action against a receiver who pleaded, by way of answer, that no leave to sue had been obtained from the court which appointed him. The answer, upon demurrer, was held to be sufficient. On an appeal from this decision to the Supreme Court of the United States, it was held that the demurrer was properly sustained. See 104 U. S. 126. The court said: "A suit therefore, brought without leave to recover judgment against a receiver for a money demand, is virtually a suit the purpose of which is, and the effect of which may be, to take the property of the trust from his hands and apply it to the payment of the plaintiff's claim, without regard to the rights of other creditors or the

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orders of the court which is administering the trust property. We think, therefore, that it is immaterial whether the suit is brought against him to recover specific property or to obtain judgment for a money demand. In either case leave should be first obtained."

It is also well settled that a receiver can not bring an action in the absence of statutory authority, without first obtaining leave of the court by which he was appointed. High Receivers, section 208; Edwards Receivers, 136; Kerr Receivers, 192, 193.

The statute provides that "The receiver shall have power, under control of the court, or of the judge thereof in vacation, to bring and defend actions * * as the court or the judge thereof may authorize." R. S. 1881, section 1228. In *Meara v. Holbrook*, 20 Ohio St. 137, the court construing a provision of the statute of Ohio relating to receivers similar to the provision of the statute of this State above set forth, said: "In this State, a receiver is appointed under the express authority of the statute, and among the powers thereby conferred upon him, as we have seen, is that of bringing and defending suit in his own name, as *receiver*.' His capacity, then, of suing and being sued 'as receiver' is a power conferred upon him by the statute, and is plainly distinguishable from that of a personal character," and held that an action might be brought against him under the statute as receiver by leave of the court appointing him.

As a receiver, in the absence of statutory authority, can neither sue nor be sued without leave of the court by which he was appointed, we think it is essential to aver in the complaint that leave to bring the action had been granted by the proper court. In *Garver v. Kent*, 70 Ind. 428, it was said: "There is no averment in the complaint, that the court appointing the plaintiff as receiver authorized him to bring this or any action or actions in his own name, in matters concerning his receivership. The objection is fatal to the plaintiff's recovery." This case was afterwards approved by this court.

 Newman v. Hazelrigg.

Moriarty v. Kent, 71 Ind. 601. See, to same effect, *Herron v. Vance*, 17 Ind. 595; *Coope v. Bowles*, 28 How. Pr. 10.

As the purpose of this action was to reach or disturb the property in the possession of the appellee, as such receiver, we hold that in the absence of an averment in the complaint that leave to bring the action had been granted by the proper court, the complaint was insufficient, and that the demurrer for that reason was properly sustained. As no such averment was made in either paragraph of the complaint, it is unnecessary to decide whether the demurrer which was filed was a separate demurrer to each paragraph or a joint one as to all. Each and all the paragraphs were, for the reason stated, insufficient. We express no opinion as to whether the complaint would have been sufficient if such an averment had been made. We merely decide that without such an averment it was insufficient.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed Feb. 22, 1884. Petition for a rehearing overruled May 29, 1884.

No. 10,776.

NEWMAN v. HAZELRIGG.

CHANGE OF VENUE.—*Presumption of Consent.*—An applicant for a change of venue filed affidavits that he could not have an impartial trial in the county, and that many of the witnesses lived in C. county, in an adjoining circuit; whereupon the other party filed an affidavit showing that he could not have a fair trial in that county, and thereupon the venue was without objection changed to another county, not in an adjoining circuit.

Held, that it would be presumed that the cause was sent to that county by agreement, and, therefore, objection to proceeding in that court should be overruled.

EVIDENCE.—*Admissions.*—*Instructions.*—An instruction to the effect that evidence of oral admissions should be scrutinized closely because of the possibility that the party might not have expressed himself clearly, and that the witness might not hear or repeat correctly, is erroneous.

From the Carroll Circuit Court.

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| 96 | 73 |
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Newman v. Hazelrigg.

J. Mitchell, H. J. Shirk and M. Winfield, for appellant.

J. Applegate, R. C. Pollard, D. D. Dykeman, J. L. Farrar, J. Farrar and W. C. Farrar, for appellee.

ELLIOTT, C. J.—The appellant applied for a change of venue, and the cause was sent from the Miami Circuit Court to the Carroll Circuit Court for trial. The record shows that the appellant filed two affidavits, one that he could not have an impartial trial in the county of Miami, and another that many of the witnesses lived in Cass county. The appellee filed an affidavit showing that she could not have an impartial trial in the latter county, and thereupon the court directed that the cause be sent to Carroll county. No objection was made to the order directing that the cause be sent to the county last named, nor does it appear that the parties did not agree that it should be sent to that county. On the first day of the term of the Carroll Circuit Court following the order of the Miami Circuit Court, the appellant entered a special appearance, and moved that the cause be remanded to the Miami Circuit Court, and upon the entry of an order overruling this motion filed a plea in abatement.

The position of the appellant is that the statute requires that in cases where a change of venue is taken the cause shall be sent to a county in the same circuit, or to a county in an adjoining circuit, and that as Carroll county is not in the same circuit with Miami, nor in an adjoining one, the court below erred in assuming jurisdiction of the cause. R. S. 1881, sec. 412. We do not think that we are required to give a construction to the statute, because we are of the opinion that as the question is presented we must presume that the cause was sent to the county of Carroll by consent of the parties. There was no objection or exception to the order at the time it was made, and from this and the fact that the record affirmatively shows that there was an attempt on one side to have the cause go to Cass county and an objection on the other, it may be fairly presumed that the parties consented that it should

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go to Carroll county. The general rule that presumptions will be made to support the proceedings of a court of general jurisdiction has been repeated a great number of times in our decisions, and surely the condition of this record is such as to make it peculiarly appropriate to apply the rule to the present case. Powell Appellate Proc. 193; *Shirts v. Irons*, 47 Ind. 445; *Hutts v. Hutts*, 51 Ind. 581; *Baker v. Simmons*, 40 Ind. 442.

The tenth instruction given by the court reads as follows:

"10. In regard to admissions claimed to have been made by the parties in interest, I instruct you that it is your duty to consider evidence of verbal admissions with caution. There are possibilities of mistake in such evidence in several particulars. The party who is claimed to make such admissions may not have expressed himself definitely and clearly; the party testifying to such admissions may not have heard accurately; he may not have remembered correctly, or he may not state clearly the words spoken or matters admitted, when called to do so during a judicial inquiry. There are these several possibilities of mistake, yet, if the party making the admissions expressed himself clearly, is heard correctly, and the statement remembered and correctly re-stated in evidence, such evidence may be as clear and convincing as any that can be given; yet, by reason of these possible infirmities of tongue, and ear, and memory, and expression, it is necessary that you carefully scrutinize the evidence of verbal admissions, in order that you may determine whether it is reliable and credible or not."

On the authority of the cases of *Finch v. Bergins*, 89 Ind. 360, *Garfield v. State*, 74 Ind. 60, and *Davis v. Hardy*, 76 Ind. 272, this instruction must be deemed erroneous. For the error in giving this instruction the judgment is reversed.

Filed June 3, 1884.

McIver v. Ballard et al.

No. 10,118.

McIVER v. BALLARD ET AL.

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EXECUTION.—*Complaint to Set Aside.*—*Fieri Facias.*—A complaint by a defendant in execution, to set aside a writ of *fieri facias*, alleging the issue, levy on lands and return without sale or other disposition of the levy, and then the issue of an alias *fieri facias*, is good on demurrer.

SAME.—*Answer of Abandonment of Levy.*—An answer to such complaint, that the levy had been abandoned, is bad on demurrer; so, also, is an answer or counter-claim, averring the same facts appearing by the complaint, and praying a correction of the alias *fieri facias* so as to conform to the statute. 2 R. S. 1876, p. 212, section 454; R. S. 1881, section 741.

SAME.—*Costs.*—If the alias *fieri facias* in such case could be corrected as prayed, the costs should be taxed to the execution plaintiff.

From the Montgomery Circuit Court.

B. T. Ristine, T. H. Ristine, H. H. Ristine, G. D. Hurley and B. Crane, for appellant.

T. E. Ballard, M. E. Clodfelter, G. W. Paul and J. E. Humphries, for appellees.

BICKNELL, C. C.—The appellant's complaint alleges that, on the 6th of March, 1880, the defendant Ballard recovered a judgment against the plaintiff for \$2,386.90, and on the 11th of March, 1880, issued an execution thereon to the defendant Krug, the sheriff, which, on the 17th of March, 1880, was levied on real estate of the plaintiff of sufficient value to satisfy the same; that on the 14th day of October, 1880, said execution was duly returned, the return showing no sale for want of bidders; that said levy is undisposed of, and that on October 15th, 1880, said Ballard issued to said sheriff another execution, like the first, and not reciting said levy and failure to sell, which second execution said sheriff has levied on the same real estate held under the former levy, and has advertised said real estate for sale under said second execution. Wherefore said second writ is void, and ought to be quashed, etc.

The defendant Ballard demurred to the complaint for want of facts sufficient; this demurrer was overruled. The defendant Krug answered the complaint separately by a general

denial. The defendant Ballard answered separately in three paragraphs :

1. Alleging the same facts stated in the complaint, and that said judgment has not been paid or replevied, and that nothing has been received or collected on said first execution ; that the same was returned long after its return day, and that on the — day of October, 1880, said levy of the first execution was abandoned by the defendant, and said second execution was issued, and that the plaintiff ever since the rendition of said judgment has been the owner of the property levied on.

2. This paragraph alleges the same facts as the first paragraph, omitting the allegation as to the abandonment of the first levy, and praying that said second execution be amended by inserting therein a recital of the return of the former execution, the levy and failure to sell, and making it conform in all things to the law. The foregoing defences were duly verified.

3. This was a general denial.

The plaintiff's demurrer to said first paragraph of answer was sustained ; his demurrer to said second paragraph was overruled. He replied to said second paragraph by a general denial. A jury returned a verdict for the defendants. A motion by plaintiff for a new trial was overruled, and his motions for judgment on the pleadings, notwithstanding the verdict, and in arrest of judgment, were also overruled. The following judgment was rendered :

" It is therefore considered and ordered by the court, that the clerk of this court amend the writ of execution mentioned in the pleadings and herein sought by plaintiff to be vacated, by reciting therein the return of the first execution, its levy and the failure to sell the real estate therein described, so as to make said writ in all things conform to the law."

The plaintiff excepted to the form and substance of this judgment, and moved the court to modify it by striking out that part of it which orders the amendment of said writ. This motion was overruled.

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The plaintiff moved that the costs be taxed against the defendant Ballard, and this motion was sustained except as to the costs of witnesses summoned to testify as to the value of the lands in question, and these were ordered to be taxed against the plaintiff, to which rulings the parties respectively excepted.

The plaintiff appealed ; he assigns errors as follows :

1. Overruling the demurrer to the second paragraph of Ballard's separate answer.
2. Overruling appellant's motion for judgment on the pleadings notwithstanding the verdict.
3. Overruling the motion for a new trial.
4. Overruling the motion in arrest of judgment.
5. Overruling the appellant's objection to the form and substance of the judgment.
6. Overruling appellant's motion to strike out that part of the judgment which directs the clerk to amend the execution.
7. Overruling the appellant's motion to strike out that part of the judgment ordering the amendment of the execution.
8. Overruling the appellant's motion to tax all the costs against the appellee Ballard.

The appellee Ballard assigns cross errors as to him as follows :

1. Overruling this appellee's demurrer to the complaint.
2. Sustaining the appellant's demurrer to the first paragraph of this appellee's separate answer.
- 3 and 4. Sustaining in part the motion of appellant to tax the costs against this appellee.

The statutes by which this case is governed are as follows :
"When any property levied on remains unsold, it shall be the duty of the sheriff, when he returns the execution, to return the appraisement therewith, stating in his return the failure to sell and the cause of the failure." 2 R. S. 1876, p. 212, section 453 ; R. S. 1881, section 740.

"The lien of the levy upon the property, shall continue, and the clerk, unless otherwise directed by the plaintiff, shall

McIver v. Ballard *et al.*

forthwith issue another execution, reciting the return of the former execution, the levy and the failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient; if not, then out of any other property of the debtor, subject to execution." 2 R. S. 1876, p. 212, section 454. Under this last section the continuance of the lien is not limited by time. *Zug v. Laughlin*, 23 Ind. 170. This section enlarges the former remedy of the execution plaintiff, by giving him a writ which not only operates as a *venditioni exponas*, but adds thereto a conditional *fi. fa.*, as to other property, if that already levied on will not satisfy the debt. *Zug v. Laughlin*, *supra*.

This enlargement of the remedy, however, does not lessen the responsibility of the plaintiff, nor does it change the nature of the levy.

An execution plaintiff under said section 454 must still use reasonable diligence to protect his levy and make it available. *McCabe v. Goodwine*, 65 Ind. 288; *Frank v. Brasket*, 44 Ind. 92; *Stewart v. Nunemaker*, 2 Ind. 47. And as to issuing another writ against the property already levied upon, his power is derived entirely from the statute.

In Indiana, it has always been held that a levy upon property, real or personal, of sufficient value to pay the debt is *prima facie* a satisfaction of the debt, and although the plaintiff may abandon one writ of execution before it is executed, and sue out another (*Steele v. Murray*, 1 Blackf. 179), yet, after a levy is made upon sufficient property, he can not abandon that levy and issue another writ while the levy remains undisposed of.

In *Lasselle v. Moore*, 1 Blackf. 226, where real property remained unsold for want of bidders, and the execution plaintiff issued another execution, the court said it would set aside such illegal execution on motion.

In *McIntosh v. Chew*, 1 Blackf. 289, the court said: "Where the goods of a defendant have been taken in execution, whether they are sold or not, the seizure is a bar to any

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other execution against him for the same debt." To the same effect are *Miller v. Ashton*, 7 Blackf. 29, and *Lindley v. Kelley*, 42 Ind. 294. And whether the execution thus improvidently issued be void or voidable, in either case it may be set aside on the defendant's motion. *Doe v. Dutton*, 2 Ind. 309.

The foregoing authorities show that the appellees' demurrer to the complaint was rightly overruled, and they show also that the appellant's demurrer to the first paragraph of the separate answer of the defendant Ballard was rightly sustained. Such a levy, instead of being abandoned by the execution plaintiff, in order to issue another execution, must be protected by him until it appears that it could not be available. The allegation in said first paragraph of answer is that the appellee Ballard abandoned the levy and issued a new execution, but this, as we have seen, he had no right to do, either at common law or under section 454 *supra*, without showing either some necessity or some valid reason therefor.

The first and second specifications therefore of the assignment of cross errors can not be sustained, and the third specification of said cross errors is unavailable, because even if appellee Ballard were entitled to the relief demanded in the second paragraph of his answer, he ought to pay the costs charged against him by the court, the appellant being in no fault.

The first specification in the appellant's assignment of errors is that the court erred in overruling the demurrer to the second paragraph of the appellee Ballard's answer.

In this paragraph the appellee repeats substantially the allegations of the complaint, and thereupon prays that his second execution may be amended so as to conform to the law. This was not valid either as a defence or as a counter-claim. The appellee Ballard had certain rights under section 454, *supra*. He did not choose to exercise these rights, but proceeded in a manner not authorized by the statute, and unknown to the common law. He states in his second paragraph of answer the fact that he acted illegally, without stating any excuse therefor, without any allegation of surprise,

Rhine, Administrator, v. Morris.

mistake, inadvertence or excusable negligence, and prays that his illegal execution may be amended. But the appellant has a right to insist that the statute shall be observed. The lien of the original levy continues, and there is no equity in the suggestion that a party who has issued an irregular execution, liable to be set aside on complaint or motion, should in a valid proceeding to set it aside be placed in the same position as if he had exercised his statutory rights. To do so without any reason alleged would effectually defeat the statute. For the error in overruling the appellant's demurrer to the second paragraph of the answer of the appellee Ballard, the judgment ought to be reversed, and this result renders it unnecessary to consider the other errors assigned.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to sustain the demurrer to the second paragraph of the answer of the appellee Ballard.

Filed June 4, 1884.

No. 11,172.

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RHINE, ADMINISTRATOR, v. MORRIS.

CONTRACT.—*Nominal Damages.*—*Complaint.*—*Decedents' Estates.*—*Supreme Court.*—A joint debtor, having obtained an agreement with those jointly indebted, that they would assume payment of the debt, died, whereupon the debt was allowed against his estate. His administrator sued the survivors, alleging the foregoing facts, but alleging neither that his decedent's estate had been compelled to pay said debt, nor that there were any assets belonging to such estate.

Held, that the complaint showed no cause of action for more than nominal damages, and that the Supreme Court will not reverse in such case.

PRACTICE.—*Striking out Pleading.*—*Bill of Exceptions.*—An exception to the striking out of part of a pleading will avail nothing, if no bill of exceptions be then filed and no time then granted for its filing.

From the Blackford Circuit Court.

VOL. 96.—6

Rhine, Administrator, v. Morris.

W. A. Bonham, J. Cantwell, S. R. Cantwell, A. Steele and R. T. St. John, for appellant.

G. H. Koons, for appellee.

FRANKLIN, C.—Appellant, as administrator of the estate of James Swoveland, sued appellee and others on a promissory note and a written agreement for the sale of an interest in a saw-mill. On motion of appellee a part of the second paragraph of the complaint was struck out. The ruling upon the motion to strike out is the only question presented by the assignment of errors.

The first paragraph of the complaint was upon the note, and the second was upon the agreement. The agreement stipulated that the defendants would pay to the deceased for his interest in the saw-mill the sum of \$300 in money, \$50 in sawing, and release the deceased from the payment of all the back payments on the mill for the purchase-money. And this paragraph alleged that the defendants had failed to perform their part of the agreement; that judgment had been rendered against the estate of deceased for said back payments of purchase-money. All in relation to this alleged breach of the agreement was struck out. Appellee was surety for the other defendants. The deceased and the other defendants had originally purchased the mill in partnership, and were each liable for the back payments. The complaint alleges that the other defendants were each insolvent, but does not show that the deceased was not in the same condition, or that there were any assets in the estate outside of this claim.

The use of the word "release" creates some difficulty in determining precisely what the parties intended. It is not an agreement by the defendants to pay the back instalments on the mill, nor to indemnify the deceased against their payment. A release is a discharge from liability to the one who executes the release, and, under the literal meaning of the word as used in this case, it could only operate in the discharge of the deceased from all liability to the defendants on account

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of the back payments; in other words, it amounted to a quit-claim title to deceased's interest in the mill. If the defendants paid the back instalments, or the mill was sold for their payment, the deceased was not to be liable to the defendants for contribution on account thereof. And we think it was further the intention of the parties that the deceased should not pay anything on said back instalments, and if he should be compelled to do so, it would be a breach of the agreement for which the defendants would be liable to him for the damages he had sustained on account of such breach. In this case the complaint does not aver any actual damages on account of the alleged breach of the agreement. It does not show that the deceased or the administrator has paid anything on said back instalments, or that there are any assets in the estate with which any part of said back instalments can be paid, or that any part of this claim, if realized, would be paid upon said back instalments.

The averments of that part of the complaint which were struck out were, perhaps, sufficient to entitle the plaintiff to nominal damages for that alleged breach of the agreement, but nothing more, and the law is well settled that this court will not reverse a judgment upon a question in which only nominal damages are involved.

The other defendants were defaulted, and a joint judgment was rendered against all the defendants. The plaintiff, in his appeal, has not made the other defendants parties in this court in the assignment of errors, and the appeal would have been liable to be dismissed for that reason had a motion been made to that effect.

Although the striking out parts of the complaint was excepted to at the time, the record shows that no bill of exceptions was then filed, nor does the record show that any time was then given in which to file a bill of exceptions. In reserving questions of this kind, it is not sufficient to afterwards give time to file bill of exceptions. R. S. 1881, section 626.

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In the case of *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144), it is said: "It is well settled that an exception must either be reduced to writing at the time it is taken, or the court, at the time, must allow a specified time for reducing it to writing."

In the case of *Alcorn v. Morgan*, 77 Ind. 184, the following language is used: "The statute is explicit; the exception must be reduced to writing at the time it is taken, or leave to afterward put in writing must be obtained at the time." See, also, *Boyce v. Graham*, 91 Ind. 420.

This question is not, therefore, properly presented by the record, but we thought it best to decide the question, as it is earnestly insisted upon by appellant.

This part of the complaint having been struck out, if the estate should pay anything upon said back instalments, this case will be no bar to enforcing a remedy when a substantial breach occurs in relation to said back instalments.

We find no available error against appellant in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed May 29, 1884.

No. 10,219.

HOFFMAN v. BOARD OF COMMISSIONERS OF LAKE COUNTY.

COUNTY COMMISSIONERS.—*Voluntary Services.*—*Complaint.*—A paragraph of complaint against a county board, in the form of a common count for work and labor performed in preparing an index, is bad on demurrer unless it avers that the services were rendered on request.

SAME.—*Special Contract.*—*Indexing Records.*—The county board has power to contract for indexing the public records of the county, and such contract may be enforced.

From the Porter Circuit Court.

J. B. Peterson and A. L. Jones, for appellant.

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Hoffman v. Board of Commissioners of Lake County.

ELLIOTT, C. J.—The appellant filed a claim before the board of commissioners of Lake county for services rendered in preparing a general index of the judgment dockets of the circuit and common pleas courts. The claim was not allowed, and he appealed to the Lake Circuit Court, and, by change of venue, the cause went to the Porter Circuit Court. In the latter court an amended complaint was filed, consisting of two paragraphs, to each of which a demurrer was sustained, and this ruling is assigned for error.

The first paragraph is a common count for work and labor performed for the county. This paragraph is bad, because it does not aver that the work was done at the request of the county or its authorized agents. For aught that appears, the services may have been voluntarily rendered, and it is a familiar rule that one can not make himself the creditor of another by volunteering to perform work for him. There are some exceptions to this general rule, but it fully and strongly applies to a case like this, where the work is done upon books which belong in an office not directly under the control of the officers charged with the duty of making contracts for the county.

The second paragraph alleges that at a regular session of the board of commissioners a contract was entered into with the appellant, wherein it was agreed that he should make, for the use of the circuit court and the citizens of the county, an index in which should be entered the names of all persons against whom judgment had been rendered in the common pleas and circuit courts, and that such index should be so arranged as that the letters of the names should appear, as the complaint terms it, "dictionary." It is unnecessary to state any other of the allegations of the complaint, for the reason that the single question involved is, whether the board of commissioners had authority to make a contract for an index to the record, and we have stated enough of the complaint to present this question.

We say that the only question is, whether the board had

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authority to make a contract for an index to the judgment records of the county, because we understand the rule to be inflexibly settled that where county or municipal officers have general power to enter into contracts, they are invested with discretionary powers as to the nature of the thing for which they contract. It is obvious that this must be the rule, since any other would result in the courts supplanting the discretion confided by law to other officers with its own, and this would result in courts assuming control of county and municipal affairs. Whether the index contracted for was such as was needed, or was the best for the county, was solely for the judgment of the board of commissioners, and if the board had authority to act at all, the judgment reached by it can not be reviewed by the courts. *Board, etc., v. Cottingham*, 56 Ind. 559; *English v. Smock*, 34 Ind. 115 (7 Am. R. 215). If the law provides that a definite thing shall be contracted for, and prescribes the mode of contracting, then no discretion is vested in the county or municipal officers, and they must conform to the requirements of the law, but there are no such statutory provisions applicable to this case.

What we have said prepares the way for a discussion of the ruling question in the case, and to that we now proceed. The statute vests in the county commissioners very comprehensive powers over the business, property and affairs of the county. The Constitution provides that county commissioners may be invested with local administrative powers, and the statute invests them with authority over county property, business and affairs. R. S. 1881, sections 160 and 5745. In one of the early cases it was said: "In legal contemplation, the board of commissioners is the county. It has the care of the property of the county, as well as its supervision and management." *State v. Clark*, 4 Ind. 315. It was said in another case that "The board of commissioners have very full powers in reference to the affairs of their respective counties. * * They control the county property." *Board, etc., v. Saunders*, 17 Ind. 437. This general doctrine is found in the cases

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of *O'Boyle v. Shannon*, 80 Ind. 159, and *City of Terre Haute v. Terre Haute Water Works Co.*, 94 Ind. 305.

The Supreme Court of the United States, speaking on this general subject, said of the board of commissioners: "It is for all financial and ministerial purposes the county." *Levy Court v. Coroner*, 2 Wal. 501. There are many cases in other courts declaring a like doctrine. *State Bank v. Chapelle*, 40 Mich. 447; *Board, etc., v. Bowen*, 4 Lans. (N. Y.) 24; *Shanklin v. Board, etc.*, 21 Ohio St. 575. It seems very clear from these authorities, that if the records do belong to the county the commissioners must have authority to place and keep them in such condition as shall make them useful to the citizens of the county; that the records do belong to the county can not well be doubted. It may be true that the county has no absolute property in the public records, but certainly the officers to whom, by the Constitution and the statute, local administrative powers are granted, must have authority to preserve these records, and keep them in such condition as shall make them subserve the purposes for which they were intended.

Judgments are liens on lands, and when entered of record impart notice to all persons. It is of great importance that indexes should be prepared with care, so that the work of examining for judgment liens may be conducted without danger of overlooking judgments or falling into errors. It should be held that securing an accurate index is a just exercise of the powers with which the commissioners are invested, for the power is exercised upon a subject in which the public interests of the county are involved, and is connected with the affairs and property of the county. In exercising such a power, the commissioners do not travel beyond the scope of their general duties, nor do they transcend their powers. On general principles the right of the commissioners to contract for an index to the judgment records of the county is clear, and there are authorities strongly supporting this proposition. In the case of *Garrett v. Board, etc.*, 92

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Ind. 518, it was held that the recorder might supply indexes in cases where his predecessors had failed to make them, and that decision goes much further than we need do here. The Supreme Court of Missouri, in the case of *Boggs v. Caldwell Co.*, 28 Mo. 586, decided that the county court, whose powers in this respect are very much like those of our county commissioners, had power to make contracts for indexes, and the court said: "There can be no reasonable doubt, we think, that the county courts have the power to order an index to be made to the books of recorded deeds, and to allow a reasonable compensation for the work out of the county funds. Although it is the duty of the recorders to keep up their indexes without any compensation from the county, and their compensation is provided by law to come from the persons having their deeds recorded, yet in the course of time it may happen that these books become unfit for use and have to be renewed. The county court is specially intrusted with the duty of seeing to the preservation of any property belonging to the county, and they necessarily have the right of appropriating a sufficient sum from the county treasury to secure the proper execution of these duties."

We do not enquire what defences may be made against such a claim as that urged by the appellant, for the demurrer confesses that a contract was entered into and the work done under the contract received by the county, and this makes a *prima facie* case. In *Nichols v. Howe*, 7 Ind. 506, it was held that "It will be presumed, where the contrary is not shown, that the board of commissioners, in the exercise of a discretionary power, did right." We act upon this rule in the present instance, and hold that as the complaint shows that the board of commissioners exercised a discretionary power, it must be presumed, until some contrary showing is made, that it properly and justly exercised its power.

Judgment reversed, with instructions to overrule the demurrer to the second paragraph of the complaint.

Filed June 3, 1884.

Lynn *et al.* v. Crim.

No. 11,205.

LYNN ET AL. v. CRIM.

PLEADING.—*Set-Off.*—*Principal and Surety.*—*Demurrer.*—To an action on a joint promissory note, an answer by way of set-off, by one of two or more defendants, must allege that he is principal, and his co-defendants are his sureties, in the plaintiff's cause of action; otherwise the answer is insufficient on demurrer.

SAME.—*Each Paragraph Sufficient.*—Each paragraph of answer must state facts sufficient to constitute a defence to the action, and the omission of necessary facts, in one paragraph, can not be cured or supplied by reference to the allegations of another paragraph.

PRACTICE.—*Reversal of Judgment.*—*Harmless Error.*—A judgment will not be reversed for an error in sustaining a demurrer to a paragraph of answer, when it appears that all competent evidence, under such paragraph, was admissible under another paragraph remaining in the record. Such an error is harmless.

From the Lawrence Circuit Court.

G. W. Friedley, E. D. Pearson and — *Edwards*, for appellants.

M. F. Dunn and *G. G. Dunn*, for appellee.

HOWK, J.—This was a suit by the appellee upon a promissory note, executed by the appellants Lynn and Moore, to the order of one James C. Lynn, and by him endorsed to the appellee. It was alleged in the complaint that the note was due and unpaid, and judgment was demanded for the amount due thereon. The cause was put at issue and tried by the court, and a finding was made for the appellee, and judgment was rendered accordingly.

Errors are assigned here which call in question the decisions of the circuit court in sustaining appellee's demurrers to the sixth, seventh and eighth paragraphs of the separate answer of the appellant Moore, and in overruling the appellants' motions for a new trial and in arrest of judgment.

The evidence is not in the record, and, in their brief of this cause, the appellants' counsel have not even alluded to the alleged errors of the court in overruling their motions for

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a new trial and in arrest of judgment. These supposed errors must, therefore, be regarded as waived. *Irwin v. Lowe*, 89 Ind. 540.

The rulings of the trial court upon the sixth, seventh and eighth paragraphs of answer, therefore, are the only errors complained of in argument by the appellants' counsel. The appellants jointly answered in four paragraphs, in substance, as follows: 1. A general denial; 2. Payment in full; 3. Want of consideration; and, 4. That appellee was not, but James C. Lynn, the payee of the note in suit, was the real party in interest and the owner of such note.

The appellant Moore separately answered in five paragraphs. In paragraph 4½ Moore admitted the execution of the note in suit, but said that it was executed, as to him, without any consideration. In paragraph 5, the appellant Moore, admitting the execution of the note sued on, averred that he was the principal and his co-defendant was his surety in such note, and that, prior to the assignment of the note to the appellee, the payee of such note was indebted to him, Moore, in the sum of \$200 on a certain judgment, etc., which judgment he offered to set off against an equal amount of the note in suit; and as to the residue of such note, he said that it was without any consideration whatever. Issue was joined upon each of the foregoing paragraphs of answer, except the one numbered 4½, to which the appellee neither demurred nor replied so far as the record shows.

With this statement of the issues in the cause, we come to the consideration of the sixth, seventh and eighth paragraphs of Moore's separate answer, to each of which he claims that appellee's demurrers were erroneously sustained.

In the sixth paragraph of his separate answer, the appellant Moore admitted the execution of the note in suit, but he averred that such note was executed pursuant to a contemporaneous parol agreement between him and his co-appellant John S. Lynn, for the purchase of a tract of land of Moore; whereby his co-appellant undertook to convert the timber-

trees on such land into saw-logs and lumber, and after realizing therefrom to pay the proceeds to said Moore to the amount of \$3,000, in payment for the land, and all over that sum to the amount of \$500 to pay to James Lynn, the payee of the note in suit; that it was further agreed that if the appellant Moore would sign the note for \$500 with his co-defendant John S. Lynn, the payee of such note, James Lynn, would credit thereon the amount of a certain judgment then held by one Mary E. Moore, the mother of appellant Moore, against such payee, theretofore rendered by a certain justice of the peace of Marion township, in such county, for the sum of \$156.50 and costs; that upon such representations and agreement so entered into, and on no other consideration whatever, he was induced to sign the note for \$500; that thereafter there was paid on such note the sum of \$100, by his said co-defendant, when it was renewed by the giving of the note in suit for \$400 on the old consideration and the aforesaid representations; and that the payee of the note, James Lynn, had knowledge of and was a party to the aforesaid representations and agreement, by and between the appellant Moore and his said co-defendant. And appellant Moore averred that the payee, Lynn, had failed to credit said judgment on said note, or to pay the same, and had assigned the note to the appellee, who had knowledge of the facts, and that he, Moore, had purchased such judgment, before the assignment of the note to appellee, and offered to set off such judgment against a like amount of the note in suit.

There was no available error, we think, in the decision of the court sustaining appellee's demurrer to this sixth paragraph of answer. Every material fact, alleged in this paragraph, could have been given in evidence under the fifth paragraph of answer, in which the appellant Moore, as we have seen, set up the same judgment against the payee of the note by way of set-off, and upon which issue was joined by a reply in denial. If, therefore, the court had clearly erred in sustaining the demurrer to the sixth paragraph of answer,

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the error would have been harmless, for it is well settled that a judgment will not be reversed for an error in sustaining a demurrer to a paragraph of answer, if all competent evidence under such paragraph were admissible under another paragraph, remaining in the record. *Wolf v. Schofield*, 38 Ind. 175; *Strough v. Gear*, 48 Ind. 100; *Marks v. Trustees, etc.*, 56 Ind. 288.

But the sixth paragraph of answer was bad, and the demurrer thereto was correctly sustained. The note in suit was the joint and several note of the appellant Moore and his co-defendant John S. Lynn, and there is nothing in the note, or in the complaint thereon, to indicate that the appellant Moore was the principal and his co-defendant the surety in such note. It was not alleged in the sixth paragraph of answer that the appellant Moore was principal and his co-defendant surety in the note sued upon. In an action upon a promissory note against two or more defendants as the makers thereof, a claim in favor of one of them can not be pleaded by him as a set-off, unless he allege that he is principal in the note, and that his co-defendants are sureties therein. Section 349, R. S. 1881; *Harris v. Rivers*, 53 Ind. 216; *Welborn v. Coon*, 57 Ind. 270; *Gregory v. Gregory*, 89 Ind. 345.

It is true that in the fifth paragraph of his answer the appellant Moore did allege that he was principal and his co-defendant surety in the note in suit, but the averment of such fact, in that paragraph, will not aid the sixth paragraph of answer, for it is a settled rule of pleading, under the code, that the defective allegations of one paragraph can not be aided or cured by reference to the allegations of another paragraph. *McCarnan v. Cochran*, 57 Ind. 166; *Smith v. Little*, 67 Ind. 549; *Entsminger v. Jackson*, 73 Ind. 144.

In the seventh paragraph of his answer the appellant Moore admitted the execution of the note in suit, but he alleged that, at and before the execution of such note, he owned a tract of timbered land in Lawrence county; that he entered into an agreement with his co-defendant and the payee of

said note, whereby they agreed that his co-defendant John S. Lynn would cut and sell the timber on said land, and would pay of the proceeds of such timber to said Moore the sum of \$3,000, and \$500 dollars in addition thereto, and, in consideration of such payments, the said Moore agreed to convey said land to his co-defendant, and to join him in the execution of a note for \$500 to James Lynn, the payee of the note in suit; that such agreement was so entered into, and said note so executed to the payee thereof; that his co-defendant proceeded to cut the timber on said land, but the same did not amount to one-third part of what his co-defendant and the payee of the note supposed and represented it would, and his co-defendant failed to consummate said agreement and abandoned the same; that the payee of the note was paid \$100 thereon, and the same was renewed by a new note for \$400, being the note now in suit, which renewal was given under all the circumstances and same considerations as the first note.

And the defendant Martin averred that the sole consideration of said note was the agreement of his co-defendant and the payee of the note to pay him as aforesaid the said amounts above set forth; that prior to entering into such agreement with them they represented to him that said timber was sufficient to pay him all the land had cost him, which they knew to be about \$3,000, and the said further sum of \$500; that appellant Moore relied upon their judgment and representations thereof, and had no other means of knowing as to the matter; that said contract was made for and on behalf of his co-defendant to the extent of said land, and for the benefit of the payee of the note to the extent of the \$500 for which the note was given, and that there was no other consideration moving to either of the defendants from said payee; that his co-defendant was to convert said timber and pay over the proceeds to him, Moore, as aforesaid, in a reasonable time; that his co-defendant did cut the most of said timber, but the total value thereof, cut and yet standing, did not exceed

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\$1,000; that both his co-defendant and the payee of the note were insolvent and without means, and had abandoned said contract, and that he, Moore, had paid his co-defendant for cutting said timber. Wherefore appellant Moore said that the consideration of the note had wholly failed.

In the eighth paragraph of his answer the appellant Moore, admitting the execution of the note, alleged that prior to its execution his co-defendant undertook to purchase of him a certain tract of land, and had agreed with him that he would cut and sell the timber from such land, and, of the proceeds, would pay the said Moore \$3,000, being what the land cost him, and if the proceeds amounted to more than that sum, he desired the surplus to the extent of \$500 to go to his uncle, James Lynn, whom he wished to aid, as he was getting old and was without means; that the said Moore entered into said agreement with his co-defendant, and with him executed and delivered to said James Lynn their note for \$500; that his co-defendant John S. Lynn proceeded to cut and sell said timber, and paid over to appellant Moore about \$900 on said arrangement; that the sum of \$100 was paid on said note to its payee, James Lynn, and a renewal note was given for the balance of \$400, under the same circumstances and considerations as the first note, and is the note now in suit; that the said sum of \$900 was all that his co-defendant had ever realized or paid him, Moore, on said agreement, and the timber failed to bring any more; and that his co-defendant John S. Lynn had abandoned said contract and was insolvent. Wherefore the appellant Moore said that the consideration of the note had failed.

The note in suit is not payable in a bank in this State, and is not negotiable as an inland bill of exchange. When the note was assigned to the appellee Crim, he took the same subject to all existing equities and defences between the makers and the payee thereof. It would seem to be clear, therefore, that the appellant might properly plead any defence in this case which he might have interposed if the suit had been

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brought by the payee of the note. It will be seen from our summary of the seventh and eighth paragraphs of the separate answer of the appellant Moore, that, in each of them, he has pleaded the matters therein stated for the purpose of showing that the consideration of the note in suit had wholly failed. We are of opinion, however, that the facts pleaded by the appellant Moore in each of said paragraphs of answer show rather that the note was given without any consideration whatever therefor. If the timber from the land, in excess of the value of \$3,000, was the only consideration of the note, and if all the timber from the land did not prove to be worth the one-third of the \$3,000, which was to be first paid therefrom, then, it is clear, we think, that there never was any consideration for the note, and it is a mistake to say that such consideration had failed.

This being so, as it certainly was, the error of the court, if such it were, in sustaining the appellee's demurrers to the seventh and eighth paragraphs of answer, was, at most, a harmless error; for each and all of the material facts stated in such paragraphs of answer were admissible in evidence under paragraph 4½ of the separate answer of the appellant Moore, which paragraph, as we have seen, was a general answer that the note in suit, as to him, was executed without any consideration. In such a case and for such an error, as already stated in this opinion, the judgment will not be reversed. *Marks v. Trustees, etc., supra*; *Traylor v. Dykins*, 91 Ind. 229.

We find no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed June 3, 1884.

Cross v. Herr.

No. 10,762.

CROSS v. HERR.

PROMISSORY NOTE.—*Procurement by Fraudulent Representations.*—*Defence.*—*Consideration.*—*Pleading.*—To a suit on a promissory note, an answer is good which alleges that the note sued on was obtained by presenting to the defendant certain notes and receipts made by the defendant to the plaintiff twenty-five years before, with false credits endorsed thereon, and representing that all were valid and binding, with a threat to sue thereon; that the defendant was very aged, and the transaction concerning the execution of the papers had wholly passed from his memory, and he believed the plaintiff's representations, that the plaintiff had fraudulently and quietly waited until the defendant would forget, for the purpose then of imposing, as aforesaid, on the defendant with said papers; that in fact said notes and receipts were made for goods at the time delivered to the defendant temporarily for the plaintiff's accommodation, all of which were in a few days returned to the plaintiff, and the notes and receipts were to be cancelled, all which the plaintiff well knew when the note in suit was given, which was done in settlement of a part thereof.

WITNESS.—*Competency of Parties.*—*Statute Construed.*—Section 499, R. S. 1881, making parties incompetent as witnesses, applies only to the cases specified therein.

From the Porter Circuit Court.

N. J. Bozarth, for appellant.

A. D. Bartholomew and H. A. Gillett, for appellee.

COLERICK, C.—This action was brought by the appellant upon a promissory note executed to him by the appellee. An answer, consisting of two paragraphs, was filed. A demurrer to the second paragraph was overruled, and a reply to both paragraphs was then filed. The issues were tried by a jury, and resulted in the rendition of a verdict in favor of the appellee, upon which, over a motion for a new trial, judgment was rendered. The rulings of the court upon said demurrer and motion for a new trial are assigned as errors.

The second paragraph of the answer averred, in substance, that prior to the execution of the note sued upon the appellant presented to the appellee certain notes, and receipts, call-

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ing for money, that had been executed by the appellee more than twenty-five years before that time, and demanded their immediate payment or settlement; that appellant had employed an attorney to collect the same, who was then threatening to institute an action thereon unless they were immediately paid or settled; that appellee was, by the presentation to him of said notes and receipts, taken by surprise; that appellant had endorsed upon said notes and receipts false and fictitious credits, purporting to represent small payments made thereon within the twenty years then last past, of which pretended payments the appellee was wholly ignorant; that appellant, at the time he so presented said notes and receipts, falsely represented and stated to the appellee that the same were genuine, and represented an honest indebtedness, and that said pretended credits represented actual payments made thereon, and that appellee could in no way escape liability on said notes and receipts, and falsely and fraudulently expressing a desire on his part to avoid litigation proposed to make a large reduction on the amount of said claims if the appellee would execute the note in suit; that appellee was then quite aged, and the transactions in which said pretended notes and receipts had their origin had wholly passed from his memory, and then knowing of no means of gainsaying the appellant's said statements, by which he was led to believe and did believe that he was liable on said notes and receipts, and so believing and relying on said statements, he executed the note sued upon in settlement of the larger claim of the appellant represented by said notes and receipts. It is then averred that the appellee, since the execution of the note in suit, has learned, and charges the fact to be, that all of said notes and receipts were given for certain goods which were, at the time of the execution of said notes and receipts, placed by the appellant in his hands for the accommodation of the appellant, and for a temporary purpose, all of which goods were within a few days thereafter returned to the ap-

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pellant, and said notes and receipts were to be cancelled and surrendered, and that none of the alleged payments represented by said pretended credits had ever been made on said notes and receipts, and that all of these facts were well known to the appellant at the time of his making the representations aforesaid, and at the time of the giving of the note in suit, and that at said times the appellant well knew that he had no honest claim against the appellee for any sum whatever, and had quietly and fraudulently kept said notes and receipts until the facts connected therewith had escaped the recollection of the appellee, and entered said false and fraudulent credits on said notes and receipts for the fraudulent purpose of avoiding the effect of the statute of limitations thereon, and thereby impose upon the appellee an apparently valid claim, which the appellant all the while knew was wholly false and fictitious. Wherefore, etc.

It is true, as asserted by the appellants, that representations to be fraudulent must be made concerning existing facts, and that fraud can not be predicated upon representations of the law, however false they may be, as every person is bound to know the law. *Burt v. Bowles*, 69 Ind. 1. But in this case the only important and material representations recited in the answer under consideration, as constituting the fraud complained of, related to existing facts. As a general rule a party who, by fraudulent representations as to existing facts, has been induced to execute an agreement, may set up such representations in bar of an action on the agreement. *Clem v. Newcastle, etc., R. R. Co.*, 9 Ind. 488. And a contract procured by such representations may be avoided, though the means of obtaining information was fully open to the party deceived, where, from the circumstances, he was induced to rely upon the information and representations of the other party. *Matlock v. Todd*, 19 Ind. 130. See, to same effect, *Bischof v. Coffelt*, 6 Ind. 23; *Ricketts v. Braun*, 42 Ind. 316; *Worley v. Moore*, 77 Ind. 567. Upon the facts stated in the answer, the appellee, if he had paid in money

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the notes and receipts therein referred to, in lieu of executing therefor the note sued upon, might have recovered the money back in an action brought by him for that purpose. See *Brown v. College Corner, etc., Gravel Road Co.*, 56 Ind. 110; *Lewellen v. Garrett*, 58 Ind. 442 (26 Am. R. 74). The answer was sufficient, and, therefore, the demurrer was properly overruled.

The only reasons assigned in support of the motion for a new trial, that are urged by the appellant in this court, are:

First. That the verdict is not sustained by sufficient evidence, and is contrary to the evidence.

Second. That the court erred in refusing to suppress certain portions of the deposition of the appellant which was taken by the appellee.

Third. That the court erred in permitting the appellee to testify to certain facts, which are specified in the motion.

We have carefully examined the evidence, and find that it fully sustains the verdict. If it merely tended to support it, we could not, under the well settled practice of this court, disturb the verdict on the weight of the evidence.

The appellant insists that neither he nor the appellee was a competent witness to testify, as they were required and permitted to do, over the appellant's objection, to matters relating to said notes and receipts, which occurred prior to the death of John Cross, the ancestor of the appellant, to whom they were payable, and cites, in support of his assertion, section 499, R. S. 1881, which provides that, "In all suits by or against heirs or devisees, founded on a contract with or demand against the ancestor, to obtain title to or possession of property, real or personal, of, or in right of, such ancestor, or to affect the same in any manner, neither party to such suit shall be a competent witness as to any matter which occurred prior to the death of the ancestor."

This action was not brought "by or against heirs or devisees," nor was it "founded on a contract with or demand against the ancestor." It was instituted by the appellant in

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his own right, on a promissory note executed to him by the appellee, and, therefore, the provision of the statute above set forth is not applicable to this case. Again, the record shows that before the deposition was read to the jury the appellant was called as a witness and testified that the notes and receipts were assigned to him, for a valuable consideration, by said John Cross in his lifetime, and it also appears by the record that before any of the evidence which was objected to was introduced, proof had been adduced clearly showing that although the notes and receipts on their face purported to be payable to John Cross, he, in fact, had no interest whatever in them, and that they actually belonged to the appellant, who at the time of their execution was in embarrassed circumstances, and had caused the notes to be made payable to his father, so as to place them beyond the reach of his creditors. No error was committed in the admission of the evidence.

It is also insisted by the appellant that the court erred in permitting the appellee to prove that a certain note executed by him, and which was surrendered to him by the appellant at the time of, and to induce, the execution of the note in suit by the appellee, was given by him without any consideration therefor. It was proper, if not necessary, for the appellee to prove that the note which was so surrendered to him was valueless, and, therefore, constituted in fact no consideration whatever for the note sued upon, and for that purpose the evidence was material and competent.

This disposes of all the questions which have been presented for our consideration, and there being no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment of the court below is affirmed at the costs of the appellant.

Filed June 4, 1884.

Gerard *et al.* v. Dill *et al.*

No. 11,345.

GERARD ET AL. v. DILL ET AL.

REPLEVIN.—*Compromise.—Dismissal.—Suit on Bond.*—Where a suit in replevin is compromised and settled by the parties, and dismissed accordingly, no suit can be maintained on the replevin bond.

From the Montgomery Circuit Court.

P. S. Kennedy, S. C. Kennedy, G. W. Paul, M. D. White and J. E. Humphries, for appellants.

J. M. Thompson, W. B. Herod and W. H. Thompson, for appellees.

ELLIOTT, J.—The complaint of the appellants counts on an undertaking filed by the appellees in an action of replevin instituted by them.

The second paragraph of the answer reads thus: "The defendants, for further cause of defence, say that before the bringing of this suit they fully settled, compromised and dismissed, by and with the consent and co-operation of plaintiff Matthew J. Gerard, the action of replevin, in which the bond sued on was given, and said Matthew J. Gerard, for himself, and as the agent of his co-plaintiff herein at the same time, and in consideration of said dismissal, agreed that the whole matter of difference between the parties thereto should be forever ended, and that litigation should cease." The answer, although not well drawn, is good, for it shows an agreement of compromise, ending all litigation and settling the entire controversy. A defendant who procures a dismissal of an action of replevin in execution of an agreement adjusting all matters of difference and terminating the controversy, can not maintain an action on the bond filed in the cause by the plaintiff. It would be unjust to permit him to allege, as a breach of the bond, that which he had stipulated for in an agreement of compromise. We need not inquire what the rule would be where there was nothing more than a simple, mutual agreement to dismiss, for here there was an agreement

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of compromise providing that all matters of difference should be forever ended, and that all litigation should cease. The cases cited by the appellants, *O'Neal v. Wade*, 3 Ind. 410, *Stevison v. Earnest*, 80 Ill. 513, and *Hall v. Smith*, 10 Iowa, 45, are not in point. The last case is nearest in point, but in that case there was nothing more shown than the defendant's consent to the dismissal of the action. There is, however, even in that case a dissenting opinion, which is not easily answered. The decision in *Hollinsbee v. Ritchey*, 49 Ind. 261, goes much farther than we are required to do, for it was there held that any agreement between the parties varying the terms of the bond would release the sureties.

The evidence fully supports the verdict. Judgment affirmed.

Filed May 9, 1884. Petition for a rehearing overruled June 4, 1884.

No. 11,526.

McCONNELL v. HANNAH, ADMINISTRATOR.

WITNESS.—*Proof of Husband's Declarations by Wife.—Decedents' Estates.*—

After the husband's death, his wife is a competent witness to prove his declarations made to others in her hearing.

EVIDENCE.—*Res Gestæ.—Declarations of Ownership.*—The declaration of one, shown to be at the time in possession of personal property, that he owns it, is proper evidence in behalf of his administrator, in a suit by the latter to recover it.

From the Knox Circuit Court.

G. G. Reily and *W. C. Niblack*, for appellant.

W. A. Cullop and *G. W. Shaw*, for appellee.

BICKNELL, C. C.—The appellee, as administrator of Robert McConnell, deceased, brought this action against the appellant, the daughter of said intestate, to recover a horse and buggy and other personal property, alleged to be a part of the intestate's estate.

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| 96 | 102 |
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The defence was the general denial.

The court found for the plaintiff as to the horse and buggy, and for the defendant as to the other property. Judgment was rendered upon the finding after the defendant's motion for a new trial was overruled. The defendant appealed. The error assigned is overruling the motion for a new trial.

The reasons for a new trial are:

1. The finding is contrary to law.
2. The finding is not sustained by sufficient evidence.
3. Permitting the plaintiff to testify that the deceased, in his lifetime, said that he owned the property in controversy.
4. Permitting the plaintiff to prove, by Columbus Robinson, that the decedent said to him, in the absence and out of the hearing of the defendant, that the horse in question was his horse—that is, the decedent's horse.
5. Permitting the plaintiff to prove, by the decedent's widow, that the decedent said to her during their marriage, and in the presence of the defendant, that the horse and buggy in suit were his property.

It appeared in evidence that the sheriff, under an execution against the decedent, levied upon the property in controversy and sold it to the appellant. The sheriff's return, as between the parties to this suit, is conclusive that the appellant was the purchaser. *Splahn v. Gillespie*, 48 Ind. 397; *Fry v. Gallaspie*, 61 Ind. 478.

It appeared that when the property was levied on, and afterwards, the decedent, with his wife and his daughter, the appellant, were living together on a farm in the same house.

The decedent's widow testified that the decedent had the property in his possession, claiming to own it up to the time of his death; that she married the decedent about two months before his death, and that during those two months the decedent had said property in his possession and claimed it as his own. To this testimony there was no objection, but this witness also stated as follows:

The plaintiff's counsel asked the witness: "What, if any-

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thing, the decedent had told his daughter Lucinda (the appellant) concerning the ownership of the property in the presence of either of the defendants?" To this the defendants objected, because the witness could not lawfully testify to any communication made to her by her husband during coverture. The court overruled the objection, and the witness answered that "her husband had told his daughter Lucinda (the appellant) that the horse and buggy were his and he intended to keep them."

The admission of this testimony is the fifth reason for a new trial, but it is not available because no exception was taken to the order of the court overruling the objection, and because the statute, section 497, R. S. 1881, excludes communications made by the husband to the wife, and the statement here proved was a communication by the husband to his daughter.

This witness further testified that one day her own daughter and the appellant were about to go to the postoffice, and the decedent hitched up the horse and buggy for them, and was tired of waiting for them, and called to them that if they did not come he would put a stop to their using the horse and buggy. On cross-examination this witness said that the defendant Lucinda and her father disputed twice about the ownership of this property, and that at one of these times said Lucinda told her father that he knew the horse and buggy were hers, to which he replied that he had furnished the money to her to buy them with.

Columbus Robinson testified that after the sheriff's sale the decedent had the horse and buggy and used them, claiming them as his own, and that witness hired the horse from decedent and plowed with him in sight of said Lucinda, who made no objection, and that the decedent bought corn and oats for the horse from the witness, and paid him for part of it and owed him for the remainder.

To this testimony there was no objection, but the appellee's counsel then asked this witness, "What, if anything, did Robert

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McConnell say concerning the ownership of the property while he was in possession of it?" To this question the appellant objected, unless the statement was made in the presence of one of the defendants, but the court overruled the objection, and the witness answered that "When he was selling the corn and oats to Robert McConnell, he said the horse and buggy were his, and he would mortgage them to me to make me safe; that at this time neither of the defendants was present." This, it will be observed, was in answer to a question, "what did he say while in possession of the property concerning the ownership of it?" The admission of this answer to that question is the fourth reason alleged for a new trial. But it was admissible as part of the *res gestæ*. Greenl. Ev., sections 108, 109; Whart. Ev., section 259. In this section Wharton says that such declarations "are admissible, though hearsay, because in such cases, from the nature of things, it is the act that creates the hearsay, not the hearsay, the act." Whenever it is competent to prove an act, a declaration of the actor accompanying the act, and relating thereto, may also be proved.

In *Hamilton v. State*, 36 Ind. 280 (10 Am. R. 22), this court said of such declarations: "They are a part of the transaction, and for that reason are admissible; and it makes no difference, so far as the admissibility of the declaration is concerned, whether it be in favor of, or against the party making it. If the act is one of alleged criminality, and the accompanying declaration tends to show it to be innocent, it is equally admissible as where the tendency is to show the criminality of the act; and it may be given in evidence by the defendant as well as by the State." See, also, to the same effect, *Boone Co. Bank v. Wallace*, 18 Ind. 82; *Lane v. State*, 16 Ind. 14.

In *Abney v. Kingsland*, 10 Ala. 355, COLLIER, C. J., says: "It has been often held, that what a person in the possession of real or personal estate says, in respect to the same, are admissible as part of the *res gestæ*." And in *McBride v. Thomp-*

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son, 8 Ala. 650, it was said by the court: "The affirmation of the party in possession, that he held in his own right, or under another, is proper evidence as part of the *res gestæ*, which *res gestæ* is his continuous possession." These statements of the law by the court of Alabama were cited and adopted by this court in *Tedrowe v. Esher*, 56 Ind. 443, and were followed in *Bunnell v. Studebaker*, 88 Ind. 338, and in *Kuhns v. Gates*, 92 Ind. 66.

In the present case the principal question was, to whom did the property belong? It was competent to prove Robert McConnell's possession of the horse and buggy as *prima facie* evidence of his ownership, and the act of possession being proved, his declarations while in possession, indicating the character of that possession, to wit, that he held as owner, were admissible, whether made in the presence of the other party or not, and whether they operated in his favor or not.

"It is no objection to such declarations that they are self-serving, if they are part of the *res gestæ*." Whart. Ev., section 262. *Entwhistle v. Feighner*, 60 Mo. 214; *Harriman v. Stowe*, 57 Mo. 93; *Elkins v. McKean*, 79 Pa. St. 493; *Insurance Co. v. Mosley*, 8 Wal. 397; 1 Phillipps Ev., Cowen & Hill's notes, 592 to 601, 644.

There is another rule, to wit, that the declarations of a vendor can not be received in disparagement of the title of his vendee. *Kieth v. Kerr*, 17 Ind. 284; *Campbell v. Coon*, 51 Ind. 76; *Garner v. Graves*, 54 Ind. 188; *Kennedy v. Divine*, 77 Ind. 490; *Tedrowe v. Esher*, *supra*. But that rule is not applicable to cases of a mere colorable sale, where there is no real change of ownership. In the present case there was evidence of declarations of the decedent, unobjected to and made in appellant's presence, showing that although the appellant was the nominal purchaser at the sheriff's sale, yet she bought with money furnished for that purpose by her father, the judgment debtor, and for his benefit, and that he remained the real owner of the property, in possession of it all the time.

In addition to the testimony unobjected to and hereinbe-

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fore set forth, Albert Shaffer testified that before the sale said Robert McConnell, in the presence of the appellant, asked the witness to buy the property, alleging that the attorney on the other side objected to his daughter bidding off the property, and that after the sale the said Robert McConnell had charge of the horse and buggy, and controlled it and offered to sell it to Mr. Reel, in the presence of the appellant, and she made no objection.

The third cause for a new trial is that the plaintiff was permitted to testify as to what the decedent had said in his lifetime; but the bill of exceptions shows that the testimony thus permitted to be introduced was not in reference to the said horse and buggy; therefore this cause for a new trial need not be considered.

The only remaining causes for a new trial are the first and second, which allege that the finding was not sustained by the evidence, and was contrary to law. But there was evidence tending to sustain the finding of the court, and, therefore, the verdict can not be disturbed. *Webb v. Zeller*, 90 Ind. 445.

The ruling herein, that where an act is admissible in evidence, a declaration accompanying the same may also be proved as essentially a part of the act, is not in conflict with the cases of *Bristor v. Bristor*, 82 Ind. 276, *Somers v. Somers*, 85 Ind. 599, and *Kuhns v. Gates*, *supra*. In *Bristor v. Bristor*, *supra*, the court said: "A party's declarations are competent evidence against him or his representatives, but can not be adduced by or in favor of either."

That is the general rule, but an exception thereto is that when declarations, qualifying and giving character to an act proper to be given in evidence, accompany that act, they are admissible whether self-serving or not, because they are a part of the *res gestæ*.

In *Somers v. Somers*, *supra*, where a declaration was held inadmissible as mere hearsay, it did not appear that the declaration was a part of the *res gestæ*. In *Kuhns v. Gates*, *supra*, the decision is exactly in accordance with the present ruling.

Powell v. The State, *ex rel.* Salyers.

There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed May 4, 1884.

No. 11,515.

POWELL v. THE STATE, EX REL. SALYERS.

BASTARDY.—*Civil Action.*—*Appeal to Supreme Court.*—A prosecution in bastardy is a civil action, and is governed by the provisions of the civil code in all respects not provided for in the act regulating such prosecutions; and, therefore, an appeal may be taken to the Supreme Court from the judgment of the circuit court in a prosecution in bastardy, in either of the modes provided for taking such an appeal in a civil action, and the fact that an appeal was prayed for, in one of these modes, is no ground for the dismissal of an appeal actually taken in one of the other modes.

SAME.—*Continuance.*—*Error.*—It is error to refuse the defendant a continuance, in a prosecution for bastardy, upon a sufficient application therefor, on the ground of absent witnesses.

From the Marion Circuit Court.

Z. K. McCormack, B. F. Davis and S. A. Forkner, for appellant.

W. T. Brown, Prosecuting Attorney, D. K. Partlow and R. Denny, for appellee.

HOWK, C. J.—This was a prosecution by the appellee's relatrix against the appellant, upon the charge that he was the father of her unborn child, which, if born alive, would be a bastard. Upon the trial of the cause by a jury, in the circuit court, a verdict was returned "that the relatrix, Hannah A. Salyers, is pregnant with a bastard child, and that the defendant, George Powell, is the father of such bastard child." Over the appellant's motion for a new trial, the court assessed the amount to be paid by him for the maintenance

Powell v. The State, *ex rel.* Salyers.

and education of the child of the relatrix, and provided in what instalments and when the amount should be paid; and judgment was rendered accordingly.

Error is assigned here by the appellant upon the overruling of his motion for a new trial. The appellee's relatrix, appearing specially, has moved this court in writing to dismiss this appeal upon the ground that the appellant, at the time of the rendition of the judgment, had prayed the trial court for an appeal to this court, which was granted upon his filing an appeal bond, in a certain penalty and with good freehold surety, and that he had filed no such appeal bond at, before or since the time of taking this appeal. This motion must be overruled. It is true, that the act of May 6th, 1853, regulating prosecutions in bastardy, does not in terms, nor does any of its amendments, make any provision for an appeal from the judgment of the circuit court in such a prosecution to the Supreme Court. Sections 978 to 999, R. S. 1881. In section 983, R. S. 1881, it is provided that "The trial and continuance thereof of such prosecution, both before the justice and in the circuit court, shall, in all respects not herein otherwise provided for, be governed by the law regulating civil suits." We have repeatedly decided that a prosecution for bastardy is a civil suit or proceeding, and is governed by the provisions of the civil code in all respects not provided for in the act regulating prosecutions in cases of bastardy. *State, ex rel., v. Brown*, 44 Ind. 329; *Galvin v. State, ex rel.*, 56 Ind. 51; *Burt v. State, ex rel.*, 79 Ind. 359.

Under the civil code a party to a final judgment of the circuit court may appeal therefrom to this court, in either one of three different modes, within one year after the rendition thereof. The fact that the appellant, in the case in hand, first prayed an appeal in term time of the trial court, which was granted, would not preclude him from afterwards taking his appeal in either of the two modes provided in section 640, R. S. 1881, and certainly affords no sufficient ground for the dismissal of his appeal, thus taken.

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The overruling of appellant's motion for a continuance of the case was assigned as cause for a new trial in his motion therefor, and is the first ruling complained of as erroneous in the brief of his counsel. The relatrix filed her complaint against the appellant in this case, before the justice of the peace, on the 10th day of January, 1884; and on the same day he was arrested on such charge, and the relatrix was examined, under oath, and her sworn statements were reduced to writing by and before such justice. The cause was called for trial in the circuit court on the 12th day of February, 1884, when the appellant, upon affidavit filed, moved the court for a continuance of the cause. The motion was overruled by the court and the trial of the cause at once proceeded, resulting, as already stated, in a verdict and judgment against the appellant. Did the trial court err in overruling appellant's motion for a continuance? This is the important, and, as we think, controlling question in this case.

The application for the continuance was made on account of absent witnesses under the provisions of section 410, R. S. 1881. When the application is made on this ground the affidavit must show (1) the name and residence of the witness, if known, and the probability of procuring his testimony within a reasonable time; (2) that the absence of the witness has not been procured by the act or connivance of the party, nor by others at his request, nor with his knowledge and consent; (3) what facts the party believes the witness will testify to, that he believes them to be true, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured; and (4) the affidavit must further show the materiality of the evidence expected to be obtained from the witness, and that due diligence had been used to obtain the attendance of the witness, or that the exercise of such diligence would have been unavailing to obtain either the attendance of the witness or his evidence at the trial.

We are of opinion that in each one of the particulars spec-

Nixon v. The State, *ex rel.* Lamb, Auditor, *et al.*

ified the affidavit filed by the appellant was sufficient, and that it was error in the court to overrule his motion for a continuance of the cause. No good purpose would be subserved by our setting out, in this opinion, the substance even of the facts which the appellant claimed he could prove by his absent witnesses named in his affidavit. It will suffice to say that these facts were material, and if produced and believed by the jury the verdict would probably have been in favor of the appellant.

Other rulings of the trial court are complained of as erroneous by the appellant; but as these are not likely to occur again on a new trial of the cause, we need not and do not consider them. The verdict and judgment rest upon the unsupported testimony of the relatrix, which, as it appears in the record, is very far from being satisfactory or convincing, and it is abundantly contradicted by the evidence of appellant's witnesses.

For the error of the court in refusing the appellant a continuance we think that the appellant's motion for a new trial ought to have been sustained.

The judgment is reversed with costs, and the cause remanded with instructions to sustain the motion for a new trial.

Filed March 28, 1884. Petition for a rehearing overruled June 6, 1884.

No. 11,331.

NIXON v. THE STATE, EX REL. LAMB, AUDITOR, ET AL.

COUNTY TREASURER.—*County Commissioners.*—*Authority.*—*Right to Buy Bonds.*—*County Property.*—A county treasurer who has received from his predecessor United States bonds belonging to the county, which had been purchased by order of the county board, and held as county property, must, on sale thereof, account for the entire proceeds thereof, including any premium, and he can not, for his own profit, question the power of the county to make the purchase.

From the Fountain Circuit Court.

Nixon v. The State, *ex rel.* Lamb, Auditor, *et al.*

T. F. Davidson, for appellant.

L. Nebeker and *H. H. Dochterman*, for appellees.

ELLIOTT, J.—The complaint of the relator alleges that on the 16th day of June, 1873, the board of commissioners of Fountain county, issued bonds of the county for the purpose of building a jail, and that to pay interest on these bonds, and to create a sinking fund for the payment of the principal, taxes were duly levied; that the taxes levied exceeded the interest in the sum of \$60,000, and that sum was placed in the hands of Isaac Haupt, then the treasurer of the county; that on the 10th day of June, 1879, the board of commissioners, at the request of Haupt, made the following order: "It is ordered by the board that the county treasurer be and he is hereby authorized to invest in United States bonds on the best terms obtainable, from time to time, such amounts of county funds as may accumulate in the county treasury, over and above the amounts necessary to defray current expenses of the county, and the county treasurer shall hold said bonds in the treasury for the payment of the county bonds issued for the payment of the cost of the construction of the county jail, when the same become due." It further alleged, that pursuant to this order Haupt, as treasurer and agent of the county, purchased government bonds to the amount, in all, of \$50,000, and that such bonds were registered as owned by "Isaac Haupt, treasurer of Fountain county, Indiana;" that the purchase of the bonds was reported by Haupt to, and his action fully confirmed by, the board of commissioners; that when he made his settlements in June, 1880, and in June, 1881, the bonds were treated as the property of the county, and as such accounted for; that Isaac Haupt's term of office expired on the 15th day of August, 1881, and on that day the appellant, as his successor, took possession of the office; that the latter received the bonds with other property, for and in behalf of the county, and executed the following receipt:

Nixon v. The State, *ex rel.* Lamb, Auditor, *et al.*

"\$59,541.58. COVINGTON, IND., Aug. 14, 1881.

"Received of Isaac Haupt, ex-treasurer of Fountain county, Indiana, the sum of fifty-nine thousand five hundred and forty-one $\frac{58}{100}$ dollars, being the balance due said county on account of county funds held by said Haupt at the close of his term of office as county treasurer, as per exhibit this day made, said amount consists of the following items:

Five per cent. United States bonds at par value . \$25,000 00

Four per cent. United States bonds at par value . 25,000 00

"Currency 9,541 58

"Total \$59,541 58

"HENRY P. NIXON,

"Treasurer of Fountain County, Indiana."

It is also alleged in the complaint, that Nixon made report, as treasurer, to the board of commissioners, but the board refused to approve it, because it did not account for the bonds received of his predecessor in office; that he was afterwards ordered to sell the bonds, and did sell them, but refuses to account for the premium received thereon.

We do not deem it necessary to inquire whether the county had or had not authority to direct the then treasurer, Haupt, to buy the bonds of the United States, for we are satisfied that Nixon has no right to contest his principal's ownership of the bonds. He received them as the property of the county from his predecessor in office, and he must account for them as the property of the county. It is not for him to dispute the authority of the county to acquire and hold property; he is charged with no such duties, and invested with no such functions. His duty was to care for the property entrusted to his custody, and not to dispute the right of the county to entrust him with it. In many cases the principle which rules the case at bar has been declared and enforced. It was said, in *Wilson v. Town of Monticello*, 85 Ind. 10, that "It is a familiar doctrine that an agent who receives money on account

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of his principal can not escape an accounting upon the ground that his principal had no right to engage in the transaction which yielded the money." And in the earlier case of *City of Indianapolis v. Skeen*, 17 Ind. 628, this doctrine was applied to a case where the agent attempted to evade accounting for bonds converted by him on the ground that the city had no authority to issue them. The cases of *Daniels v. Barney*, 22 Ind. 207, *United States Ex. Co. v. Lucas*, 36 Ind. 361, and *Reed v. Dougan*, 54 Ind. 306, assert, very emphatically, the doctrine that where an agent receives money or property for his principal, he is estopped to deny the principal's right to it. A treasurer, or other officer, who receives property for a public corporation and as its agent, has no right to inquire into the authority of the corporation to acquire the property, but is bound, when called upon, to render a due account. *Ross v. Curtiss*, 31 N. Y. 606; *People, ex rel., v. Brown*, 55 N. Y. 180. Many cases might be cited in support of the general principles we have stated, but we deem it necessary to cite only a few of them: *State v. Tumey*, 81 Ind. 559, *vide* opinion, p. 564; *Boehmer v. County*, 46 Pa. St. 452; *Wylie v. Gallagher*, 46 Pa. St. 205; *McLean v. State*, 8 Heisk. 22, *vide* opinion, p. 255; *Miller v. Moore*, 3 Humph. 188; *McGuire v. Bry*, 3 Rob. (La.) 196; *Mississippi Co. v. Jackson*, 51 Mo. 23.

It is a familiar rule that profits accruing from the property of a principal belong to him, and not to the agent. This principle runs through all cases where there is a relation of trust, and it is everywhere held that the profits belong to the owner of the property, and not to the mere custodian. A forcible illustration of the application of the rule is furnished by the case of *Hadley v. State, ex rel.*, 66 Ind. 271, wherein it was held that the treasurer of a school corporation is bound to account for interest accrued on warrants issued to him by the city officers. The case cited is identical in principle with the present, and controls it.

The question between Nixon and the relator is entirely different from what would have been the question had his pred-

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cessor refused to buy the bonds and insisted upon his right to retain the money, for, when Nixon came into office, the property had been acquired, and he received the bonds as property, and not as money. As said in a similar case: "It does not lie in his mouth to repudiate his solemn official acts for his individual benefit." *Ham v. Silvernail*, 7 Hun, 33. The plainest principles of the law of estoppel, as well as of justice, require that he should not be permitted to reap a profit by denying what he had solemnly affirmed.

County commissioners have extensive, although by no means unlimited, powers over county finances, and when they accept the settlement of county officers and take property, their acts will generally be sustained. In the present case, they had authorized Haupt to buy these bonds, had approved his current and final reports showing the purchase and possession of them, and Nixon had treated them as the property of the county. Under these circumstances, he can not be heard to aver that the board of commissioners transcended its powers. The case is not at all like that of county officers doing a thing made illegal by statute, nor is it like that of officers going entirely outside of the line of their duties. A review of the adjudged cases will show that the purchase of the government bonds was not prohibited by statute, nor, indeed, entirely beyond the authority of the commissioners. In *Halstead v. Board, etc.*, 56 Ind. 363, it was held that the board of commissioners had authority to lend county funds, and that they might under this authority buy and take an assignment of a mortgage, although the transaction was not technically a loan. It was said in *Board, etc., v. Saunders*, 17 Ind. 437, that "We are of opinion that under these and various other statutes that might be referred to, the board of county commissioners have a supervisory control over the finances of the county, and consequently have the power to settle in reference to the same, and to bind the corporation by such settlement." In *Vanarsdall v. State, ex rel.*, 65 Ind. 176, it was held that the board had authority to take

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the assignment of a mortgage in payment of a claim due the county. A distinction was drawn between the violation of an express statute and a mere want of power in the case of *Sturgeon v. Board, etc.*, 65 Ind. 302, and it was held that a note given for an unauthorized loan was not void. In *Shannon v. O'Boyle*, 51 Ind. 565, and *O'Boyle v. Shannon*, 80 Ind. 159, it was decided that the commissioners have general authority over county property. In speaking of the board of commissioners it was said, in *State v. Clark*, 4 Ind. 315, that "It has the care of the property of the county, as well as its supervision and management." The decisions of other courts are in harmony with our own. The court said in *Boehmer v. County*, 46 Pa. St. 452, that "The county commissioners are the contracting power and the fiscal agents for the county;" and it was held that a county treasurer and his sureties were liable for the conversion of county funds, although the commissioners had no authority to borrow the money which was converted by the treasurer. Speaking of the board of commissioners the Supreme Court of the United States said: "It is for all financial and ministerial purposes the county." *Levy Court v. Coroner*, 2 Wal. 501. The cases agree that the board may compromise with a defaulting treasurer and accept property in satisfaction of the claim of the county it represents. *State Bank v. Chapelle*, 40 Mich. 447; *Board, etc., v. Bowen*, 4 Lans. (N. Y.) 24; *Shanklin v. Board, etc.*, 21 Ohio St. 575. In the case last cited it was held that the board might accept from the defaulting officer a certificate of deposit, and that when accepted it became county property. In the course of the opinion it was said of the board of commissioners that "it is in an enlarged sense the representative and guardian of the county, having the management and control of its financial interests." It seems clear, upon these authorities, as well as upon principle, that as the board of commissioners had accepted the government bonds as the property of the county, they became, so far at least as the appellant is concerned, county property, and he can not be per-

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mitted to question the action of the commissioners for the purpose of seizing the profit accruing from the investment.

Judgment affirmed.

Filed March 27, 1884.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—Counsel for appellant insists that we did not correctly state the averments of the complaint upon the subject of the ownership of the bonds, and asserts that it is not averred that they belonged to the county and were so treated prior to the appellant's induction into office. The record directly and unmistakably refutes counsel's assertion. It is repeatedly averred that the bonds did belong to the county, and were delivered to and received by the appellant as the property of the county. We copy one of the many averments of the complaint: "That in pursuance of said order and under and by virtue of the same, and not otherwise, the said Isaac Haupt, as treasurer of said county, and as agent of the board, did, on or about the 26th day of November, 1879, for the use and benefit of said county, purchase of the United States registered bonds of said government."

The answer does aver that the appellant did not have any agreement with his predecessor that he should hold the bonds as the property of the county, but it contains no denial of the receipt set forth in the complaint, and that shows how the bonds were received and held. It is true that a receipt may be explained or contradicted, but there are no facts stated explaining or contradicting it, and, therefore, it is admitted to be correct. The recitals of a receipt are, as everybody knows, *prima facie* true. But suppose it to be true that appellant had signed no such receipt, and had made no agreement with his predecessor, still his answer does not meet the material averment in the complaint that the property belonged to the county. We suppose it to be perfectly clear that an incoming treasurer can not acquire title to property which the county owns because his predecessor omits to notify him that

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the county does own it. If it were conceded—a concession the record does not warrant—that every other material allegation of the complaint was fully answered, the answer would still be bad for failure to answer this one material averment. An answer in confession and avoidance must avoid not merely some but all of the material averments of the complaint. The material fact that the bonds were bought with county money for the county, and were held by the appellant's predecessor as county property, is not denied directly or indirectly; and with this material fact admitted, the appellant has neither a legal nor a moral right to claim the profits earned by the county property. But there is more than this fact admitted, for there is no attempt to show any mistake or untruth in the statements of the receipt, and until something of the kind is shown, the recitals of that instrument bind the appellant.

The authorities cited in the original opinion show that the county may buy property, and if it may do this there is no reason why it may not buy government bonds where it is requested by the treasurer, and in cases where it becomes necessary for the protection of the fund to make some investment. It is shown in this case that the treasurer desired the investment to be made in order to ensure the safety of the fund, and that it was made long before the appellant came into office. No rule of law or ethics authorizes an incoming treasurer to sit in judgment on the acts of his predecessor and of the board of commissioners performed long before he entered upon his official duties. If a county board buys property it has no right to buy, the treasurer can not seize it for his own profit. There is a way to try such a question, but it is not the one adopted by the appellant.

The case of *Board, etc., v. Fennimore*, 1 Coxe (N. J.) 242, so much relied upon by the appellant, is not in point. We give the entire opinion: "*Per Curiam*.—The evidence is admissible; these bonds must have been received as cash, for the defendant, in the capacity of county collector, had no

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right to receive them in any other way. He is therefore answerable as for so much cash; he makes himself the debtor by receiving them. Besides, after having admitted the correctness of the charge against him on a former occasion, he will not be permitted, without showing some good reason, to question it now." We have no such case here, for there is no question as to what the treasurer may receive in payment. Here the funds had been collected, and were, at the request of the treasurer and by order of the board of commissioners, invested in government bonds, and these bonds treated as the property of the county.

The appellant did not purchase the bonds; he simply received them as property turned over to him by his predecessor in office, and was not entitled to notice of how they were held; but if he had been, the manner in which such bonds were registered was sufficient to impart notice of the fact that Haupt did not hold them in his individual right. *Bundy v. Town of Monticello*, 84 Ind. 119; *Shaw v. Spencer*, 100 Mass. 382. Not only did the registry impart notice, but the face of the bonds themselves also gave definite information of the official character of the person to whom they were payable.

We might have disposed of the questions now made upon the answer by treating them as waived, by a failure to discuss them in the original brief, but we have thought it better to dispose of them by a decision upon their merits.

Petition overruled.

Filed June 4, 1884.

No. 10,143.

NEWCOMER ET AL. v. HUTCHINGS ET AL.

MECHANIC'S LIEN.—*Notice.*—*Mistake in Description.*—*Correction.*—*Pleading.*

—The notice of lien, by mistake, named lot 9, instead of lot 11, in block 7, in a town, but recited that the lien claimed was for lumber furnished by the plaintiffs to the contractor, and used by him in building for the defendants, recently, a brick building on the property de-

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scribed. The complaint, not otherwise challenged, averred the mistake, that the only building ever built for or owned by the defendants in block 7, was on lot 11, and not on lot 9, and is well known and can be identified by the description in the notice.

Held, that the complaint was good on demurrer.

Held, also, that an answer by which the defendants alleged that the contractor broke his contract, whereby the defendants suffered damage which they prayed be allowed them against the plaintiffs, was bad on demurrer.

SUPREME COURT.—*New Trial*.—The Supreme Court will not award a new trial when the verdict is clearly right upon the evidence.

SAME.—*Instructions*.—The refusal of instructions asked presents no question to the Supreme Court, unless all the instructions given are in the record.

SAME.—*Evidence*.—*Harmless Error*.—The admission of evidence, so entirely immaterial that it could not influence the verdict, is a harmless error.

SAME.—*Brief*.—A brief, which merely states the question and does not argue it, is not sufficient.

From the Tipton Circuit Court.

R. B. Beauchamp and *G. H. Gifford*, for appellants.

D. Waugh and *J. P. Kemp*, for appellees.

BICKNELL, C. C.—The appellees brought this suit against the appellants to enforce a lien for materials furnished by the appellees to one Coxen, and used by him in the erection of a building for the appellants, on parts of lots 10 and 11, in block number 7, of the original plat of the town of Tipton.

A jury gave the plaintiffs a verdict for \$85, the defendants' motion for a new trial was overruled, and judgment was rendered on the verdict and for the enforcement of the lien. The defendants appealed.

The first two errors assigned are overruling the demurrers to each of the first and second paragraphs of the complaint.

The only objection made to these paragraphs is, that the notice of lien, a copy of which is made part thereof, describes the property as the west two-thirds of the west one-third of lots numbers 9 and 10, in block number 7, in the original plat of the town of Tipton, and the brick building recently erected thereon; while, in the body of the complaint, the

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description is the west two-thirds of the west one-third of lots numbered 10 and 11, in block number 7, of the original plat of said town.

The complaint contains the following averments: That in preparing said notice said lot number 11 was by mistake designated as lot number 9; that the part of lot number 11, owned by defendants, is entirely covered by said brick building, which also extends over lot number 10 forty-eight feet; that said brick building is the only brick building ever built for defendants or owned by them in said block number 7, and the only building in said town that answers the description given in said notice; that said lots 10 and 11 lie side by side, and are sixty-six feet wide by one hundred and ninety-eight feet deep, and that said brick building covers all of said ground except twenty-two feet off the north end thereof, which is used and occupied in connection with said building, and that said building and its location in said block number 7 is well known by the citizens of Tipton and persons acquainted therein by the description given in said notice, and can be readily identified and located by said description.

The notice also stated the following, after naming the amount claimed: "Being for a balance now due and unpaid for material sold and delivered by us to Emanuel R. Coxen, in our firm name of Hutchings & Means, he, Coxen, being the contractor with you at the time, for the building and completing of said brick building, recently erected on the above described real estate, which said material, so sold and furnished by us to said Coxen, was so sold and furnished for, and to be put into, and was all put into and used in the construction of, your brick building recently erected on the above described real estate, as aforesaid."

There was no error in overruling the demurrers to the several paragraphs of the complaint. *City of Crawfordville v. Johnson*, 51 Ind. 397; *City of Crawfordville v. Barr*, 65 Ind. 367; *Tindall v. Wasson*, 74 Ind. 495; *Rucker v. Steelman*, 73 Ind. 396; *City of Crawfordville v. Boots*, 76 Ind. 32.

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The defendants filed an answer in two paragraphs, of which the first was the general denial, and they also filed a cross complaint in two paragraphs, and a counter-claim.

The plaintiff filed a demurrer to the counter-claim for want of facts sufficient, and said demurrer was sustained, and this ruling of the court is the third error assigned by the appellants.

In the counter-claim the defendants allege that Coxen had a contract with the plaintiffs which the plaintiffs failed to fulfil, and they say that they sustained damage by reason of such failure, and they claim the benefit of Coxen's contract, and ask that the damages for the breach thereof be allowed to them against the plaintiffs in this action. There was no error in sustaining the demurrer to this counter-claim.

The fourth error assigned by the appellants is that the court erred in sustaining the motion to strike out part of the defendants' second paragraph of answer.

This can not be considered, because the matter stricken out is not shown by a bill of exceptions. *Peck v. Board, etc.*, 87 Ind. 221.

The plaintiffs filed an answer to the defendants' cross complaint in one paragraph, and the defendants filed a demurrer to said answer, which demurrer was overruled by the court, and this ruling is alleged as error in the fifth specification of the assignment of errors.

In the cross complaint the defendants seek to have their title quieted as to the land on which the said brick building stands, by reason of the alleged defect in the notice of lien. In the answer to said cross complaint the plaintiffs make, substantially, the same averments, as to the land and the lien, and the notice of lien, as are made in the complaint, and the same reasons which show that the complaint was sufficient on demurrer also show that the answer to the cross complaint was sufficient. There was no error in overruling the demurrer to the answer to the cross complaint.

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The sixth error assigned is that the court erred in overruling the motion for a new trial.

There are sixteen reasons for a new trial. Of these the twelfth reason is that the court erred in giving to the jury, of its own motion, instructions numbered from one to five inclusively.

The appellants, in their brief, mention only the first, second and third of these instructions, and they make no discussion of these; all that they say as to the first and second is, "We do not desire to reiterate our views given in speaking of the appellees' complaint, as we do not think either one of the instructions states the law." And as to the third instruction, all that is said is, "We do not think the same contains a sufficient definition to enable the jury to fully understand the nature of such a plea as an estoppel."

Upon such a presentation pointing out no specific error, it is sufficient for us to say that we discover none. *Nowlin v. Whipple*, 89 Ind. 490; *Irwin v. Lowe*, 89 Ind. 540; *Powers v. State*, 87 Ind. 144. And if the instruction as to an estoppel was not sufficiently full, it was the duty of the appellants to prepare a proper instruction supplying the deficiency, and request it to be given. Besides, we have examined the evidence with reference to the fourteenth, fifteenth and sixteenth reasons for a new trial, which allege that the damages were excessive, and that the verdict was contrary to law and not sustained by the evidence, and we find that the verdict was clearly right upon the evidence, and, therefore, even if the instructions were erroneous, they would not warrant a reversal of the judgment. *Norris v. Casel*, 90 Ind. 143.

The thirteenth reason for a new trial is that the court refused to give to the jury each and all of the thirteen instructions requested by the defendants. But there is nothing in the record showing that the instructions contained in the bill of exceptions were the only instructions given in the case. Therefore this reason for a new trial can not be considered. *Fitz-*

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gerald v. Jerolaman, 10 Ind. 338; *Coryell v. Stone*, 62 Ind. 307; *Smith v. Kyler*, 74 Ind. 575; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Indiana, etc., Co. v. Millican*, 87 Ind. 87.

The second reason for a new trial relates to the proof of the notice. Upon this all that is said in the brief is: "The second cause assigned is that the court permitted the appellees to prove to the jury that the notice was filed in the office of the recorder of the county wherein the property is situate. See page 36 of transcript, line 13. We think the appellees were not entitled to the proof, as we do not think the instrument constituted any lien on the real estate of the appellants." There was no error in this respect.

The third cause for a new trial is thus mentioned in the brief, viz.: "Appellees' counsel was allowed to testify before the jury that there existed a mistake in the notice, and that the notice ought to have stated lots 10 and 11 and not 9 and 10, and also stating to the jury the location of the building, thus seeking, by parol evidence, to enforce a lien on real estate not described in the notice." Under the averments of the complaint this testimony was properly admitted.

The fourth, fifth, sixth, seventh and eighth causes for a new trial are mentioned in the brief, with the following statement: "We claim that the appellees were not entitled to the evidence brought out on these cross-examinations, and that they were not proper cross-examinations." A brief which merely states a question, and suggests that the ruling of the court was wrong, is a not a proper brief within the decisions of this court. Merely stating that the court erred in admitting testimony, without any argument or citation of authority, is substantially only a repetition of the reasons for a new trial and amounts to nothing. *Bray v. Franklin Life Ins. Co.*, 68 Ind. 6; *Wilson v. Holloway*, 70 Ind. 407; *City of Anderson v. Neal*, 88 Ind. 317; *McCann v. Rodifer*, 90 Ind. 602; *Nowlin v. Whipple*, *supra*; *Irwin v. Lowe*, *supra*.

The ninth, tenth and eleventh causes for a new trial are grouped together in the brief, with the following statement

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only: "It seems to us that it could make no difference in the merits of the case if appellant Moore did say and think all that is stated by the witnesses; it is irrelevant." But in reference to the previous testimony in the cause, these statements of the appellant Moore were not irrelevant. There was no error in admitting them.

The only remaining reason for a new trial is the first, which charges error in permitting the witness Overman to state that Hutchings, one of the appellees, the night before Coxen went away, asked witness to accept an order on him by Coxen, and that witness refused to accept it. This was objected to on the ground that the declarations of a party in the absence of the other party can not be given in evidence by the former. This evidence was admitted on the statement of plaintiffs' counsel that he would show that said conversation was communicated to the defendants. The appellees claim that the bill of exceptions shows that the conversation was so communicated, but whether communicated or not it was absolutely immaterial, and could not have had any effect on the verdict; therefore, even if it were erroneously admitted, such an error would not warrant a new trial. *McDermitt v. Hubanks*, 25 Ind. 232; *Pettis v. Johnson*, 56 Ind. 139. This disposes of the motion for a new trial.

The seventh specification in the appellants' assignment of errors is, that the court erred in overruling the motion in arrest of judgment. It appears from what has been hereinbefore stated in reference to the demurrer to the complaint, that there was no error in overruling this motion. There is no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed June 4, 1884.

List et al. v. Padgett.

No. 11,289.

LIST ET AL. v. PADGETT.

INTOXICATING LIQUOR.—Granting License to Sell.—Remonstrance.—May be Filed Before County Commissioners Only.—The remonstrance provided for by section 5314, R. S. 1881, against the granting of license to sell intoxicating liquors, must be presented to the board of county commissioners; and it is not error for the circuit court to refuse to permit a person to become a remonstrant when the cause is pending therein on appeal.

SAME.—Qualification of Remonstrator.—Privilege to Remonstrate Lost by Removal from Township.—If one remonstrating under said statute, during the pendency of the cause after the filing of his remonstrance, cease to be a voter of the township for which the license is sought, he will thereby lose the personal privilege of being a remonstrant, and there will be no error in dismissing his remonstrance and refusing him permission to further resist as a remonstrant the granting of the license.

From the Johnson Circuit Court.

J. H. Jordan, G. W. Grubbs, G. A. Adams, L. Ferguson, W. R. Harrison and W. E. McCord, for appellants.

J. V. Mitchell, J. F. Cox, J. E. McDonald, J. M. Butler and A. L. Mason, for appellee.

BLACK, C.—In March, 1883, the appellee applied to the board of commissioners of Morgan county for license to sell intoxicating liquors in Martinsville, Washington township, in said county.

Bedford C. Wigginton and Samuel J. List remonstrated, in writing, before said board against the granting of such license, making general and specific charges of unfitness of the applicant. The board of commissioners refused to grant the license, and the applicant appealed to the Morgan Circuit Court. Venue was changed to the Shelby Circuit Court and thence to the Johnson Circuit Court, where, on the 24th of September, 1883, said Wigginton, by his attorney in fact, dismissed his remonstrance. At the same time, a power of attorney executed by said List, on the 11th of September, 1883, was filed by the attorney in fact, therein named, one Hilton, whom said List thereby authorized to

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dismiss his said remonstrance; and thereupon said attorney in fact of said List moved to withdraw and dismiss List's remonstrance. But List appeared by other attorneys in fact, and objected to the dismissal of his remonstrance under said power of attorney, which it was shown said List had revoked by a power of attorney, dated September 20th, 1883, by which he authorized said other attorneys in fact to prosecute his said remonstrance.

Pending said motion of Hilton to dismiss and the objection thereto, it having been shown that said List, after the filing of his remonstrance, had removed to the State of Illinois and was then a resident thereof, the court, over the objection of List and his attorneys in fact appointed September 20th, 1883, and over their offer to proceed with the trial of said remonstrance, dismissed said remonstrance as to said List, and refused to permit him longer by his said attorneys to prosecute said remonstrance. Thereupon, Merwin W. Rowe filed his sworn application, wherein he represented that he was a resident of Washington township, Morgan county, Indiana, and that he was over twenty-one years of age and was a legal voter of said township; and he asked to be permitted to add his name to said remonstrance and to contest said application, and alleged that the material and substantial allegations in said remonstrance were true.

Upon motion of the applicant, the petition of said Rowe was rejected.

The cause coming on for trial, said List and Rowe moved that a jury be empannelled and sworn to try the cause. Upon objection made by the applicant, the court refused to allow a jury to be called. The cause was tried by the court. On the trial, the court, upon objections made by the applicant, rejected evidence offered by attorneys on behalf of said List and Rowe. The court found in favor of the applicant, and rendered judgment accordingly, from which said List and Rowe appeal.

If the court did not err in dismissing the remonstrance as

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to List, or in refusing to permit Rowe to become a remonstrant, the judgment must be affirmed.

The statute, section 5314, R. S. 1881, provides that "it shall be the privilege of any voter of said township to remonstrate, in writing, against the granting of such license to any applicant, on account of immorality or other unfitness, as is specified in this act."

There is no other provision authorizing a remonstrance in such cases, and it is manifestly intended that the remonstrance shall be presented to the board of commissioners.

In *Miller v. Wade*, 58 Ind. 91, it was held to be error to permit a person to become a party as a remonstrant after the case was appealed to the circuit court, and while it was pending therein. We are asked to overrule that decision, but we think it was clearly right. It follows that there was no error in rejecting the application of the appellant Rowe.

It does not affirmatively appear that the appellant List was at any time a voter of said Washington township. He so described himself in his remonstrance. In his first power of attorney he referred to himself as of Douglass county, Illinois, and as having removed from Morgan county, Indiana, to Douglass county, Illinois. In his second power of attorney, he referred to himself as "now of Hinesborough, county of Douglass, State of Illinois, and late of Martinsville, Washington township, Morgan county, Indiana." There was no evidence, or agreement of parties, or finding of the court, that he was at any time a voter of said township.

The court based its action in dismissing the remonstrance as to List upon the ground that it was shown that since the filing of his remonstrance, and since the proceeding had been pending, he had removed to and was a resident of the State of Illinois; and we will proceed upon the assumption that at the time of filing his remonstrance before said board, he was a voter of said township.

The statute which authorizes the remonstrance says: "It

shall be the privilege of any voter of said township to remonstrate."

The person who remonstrates exercises thereby a personal privilege; he does not represent the public or any portion of the community except himself. If it can not be said that all who do not remonstrate consent to the granting of the license, it may be said that they make no objection thereto.

The proceeding for obtaining a license is a judicial proceeding (*Halloran v. McCullough*, 68 Ind. 179), and whether there be a remonstrance or not, the license does not issue as a matter of course without proof, but the applicant must show that he is a fit person to be entrusted with the sale of intoxicating liquor, and that he is not in the habit of becoming intoxicated. *Goodwin v. Smith*, 72 Ind. 113 (37 Am. R. 144). Provision is thus made for the protection of the community, though there be no remonstrance. However, any voter of the township has the privilege of remonstrating on account of immorality or other unfitness, as specified in the statute; he expostulates for himself alone.

Whatever personal interest this privilege may be supposed to subserve, no one, in the eye of the law, has any sufficient interest or recognizable motive upon which to base such a privilege, unless he has the qualification of being a voter of the township.

If, before the board of commissioners, or in the circuit court, where the matter must be investigated, not for the review of errors, but *de novo*, it should be made to appear that a remonstrant had not been, at any stage of the proceeding, a voter of the township, his remonstrance might properly be dismissed; he would not be injured thereby.

If, at the time of the filing of a remonstrance before the board, the remonstrant be a voter of the township, and during the pendency of the proceeding he cease to have that qualification, and if because of such want of qualification his re-

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monstrance be dismissed, no one else can be supposed to be injured or in any way affected by such dismissal; and he can not for himself claim to be injured. Whenever he ceases to have any recognizable interest in the prevention of the sale of intoxicating liquors in that township, his qualification for the personal privilege of opposing the granting of the license is gone.

It is urged that List had an interest in prosecuting his remonstrance for the purpose of saving himself from a judgment for costs. He had been exercising a personal privilege, and he voluntarily deprived himself of his qualification for such a privilege, and relinquished, of his own accord, whatever interest the privilege may be supposed to have been based upon. No question was raised as to what should be the rule in relation to costs in such a case. The question here is whether List can claim that there was an error injurious to him in refusing to permit him to continue as a remonstrant to resist the granting of a license to the applicant after List had lost all interest in that question by his voluntary forfeiture of his qualification for the privilege of remonstrating. If the community in which he lived when he filed the remonstrance, or any members thereof, desired to utilize his remonstrance by resisting under it the granting of the license, he can not complain because such privilege was not accorded to such other persons; and he, having ceased to be a voter of the township, can not complain on his own behalf because he was not longer permitted to make such resistance.

The judgment should be affirmed.

PER CURIAM.—It is ordered, on the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed June 4, 1884.

 Patton et al. v. Board of Commissioners of Montgomery County.

No. 11,372.

PATTON ET AL. v. BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY.

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| 96 | 131 |
| 127 | 556 |
| 96 | 131 |
| 133 | 47 |
| 96 | 131 |
| 136 | 579 |

BRIDGES.—*Duty to Repair.*—*Negligence.*—*Liability of Counties under Act of 1881.*—County bridges are under the control of the board of Commissioners, and for negligence in suffering them to get out of repair the county is liable, and this liability is not changed by the act of 1881.

From the Montgomery Circuit Court.

G. W. Paul, M. D. White and J. E. Humphries, for appellants.

J. M. Thompson, W. B. Herod and W. H. Thompson, for appellee.

ELLIOTT, C. J.—The appellants' complaint is for an injury alleged to have been caused by the negligence of the county authorities in suffering a bridge of the county to become unsafe. The injury occurred while the act of 1881 was in force, and it is contended by the appellant, that under that act the superintendent of roads, and not the county commissioners, is the party against whom the action should be brought.

It was said, in *State v. Clark*, 4 Ind. 315: "In legal contemplation, the board of commissioners is the county." In another case it was said: "The board of commissioners have very full powers in reference to the affairs of their respective counties. * * They control the county property." *Board, etc., v. Saunders*, 17 Ind. 437; *Nixon v. State, ex rel., ante*, p. 111. Bridges belong to the county, not to the superintendent, supervisor or any other ministerial officer, and with the right of ownership goes the burden of responsibility. The county is responsible for the care and management of the public property entrusted to its charge, and where that property is a bridge, it is bound to keep it in reasonably safe condition for travel. The right of action is, therefore, against the county, and actions to recover damages from the county must be

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brought against the board of commissioners, and not against subordinate ministerial officers.

The principle upon which counties and other public corporations are held responsible for injuries occurring from the negligence of officers respecting bridges, is, that as the governing officers are provided with means for making bridges safe, and are required to keep them in repair, there rests upon the corporations a duty to employ the means placed at their command for the purpose contemplated by the law. Having the means to make bridges safe, they are bound to use reasonable diligence to effect that object; if they fail in this they are guilty of a breach of duty, and, as a general rule, a breach of duty on the part of the corporation constitutes actionable negligence. Our cases apply this principle to the duty of counties in maintaining public bridges. *Board, etc., v. Emmerson*, 95 Ind. 579; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Brown*, 89 Ind. 48; *Board, etc., v. Deprez*, 87 Ind. 509. The duty rests upon the corporation, and, although the specific act of negligence may be committed by one of its officers, the right of action is against the public corporation.

It is a general rule that the negligence of an agent or officer of a town or city is the negligence of the corporation. This rule is so well settled that it is unnecessary to cite authorities upon the point. We can perceive no reason why it should not apply to counties. Under our system counties have organized forms of government and, unlike English counties, constitute corporations invested with powers of local government. If cities and towns are held to responsibility for the acts of ministerial officers, so must counties be, or we must, arbitrarily and without reason, create an exception to a well settled principle. Road superintendents and supervisors are ministerial officers, holding a position similar, in all material respects, to that held by street commissioners in cities, and there are scores of cases holding that for the negligence of street commissioners the corporations are answerable.

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A supervisor or superintendent is not a governing officer, but is a mere ministerial officer. He can raise no revenue for the repair of bridges; that can only be done by the governing officers who represent the corporation, and whose acts are, in legal effect, the acts of the corporation. The failure to raise revenues and to see that they are properly applied is the failure of the corporation, no matter what one of the officers may have failed in his duty. The person injured by the breach of duty has a right, therefore, to demand reparation for the wrong from the corporation.

The act of 1881 does not take from the board of commissioners governing power. The board retains general authority over all county affairs, and the superintendent is a subordinate ministerial officer charged with the performance of specific duties, but acting for the county concerning the repair of public bridges, and if he is negligent the county is responsible, upon the familiar rule that the principal must answer for the act of the agent. The reasoning in the case of *Board, etc., v. Emmerson, supra*, is applicable to the present question, although the statutes are not entirely similar. In our opinion the conclusion there reached, that the commissioners are continued as the controlling officers with general governmental powers, and that the supervisor or superintendent is a subordinate ministerial officer, is the correct one, whether applied to the act of 1881 or that of 1883.

It seems quite clear that neither the act of 1881 nor that of 1883 intended to take the bridges from the general supervision of the governing officers of the county, and, if this be so, then it follows that for a negligent breach of duty on the part of subordinate ministerial officers, the county must be liable.

Judgment reversed with instructions to sustain appellants' motion for a new trial.

Filed June 4, 1884.

Gordon v. Gordon.

No. 11,158.

GORDON v. GORDON.

CONTRACT.—Pleading.—A written contract of lease, for a certain rent, with stipulations that the lessor will pay for repairs and will pay the lessor for the support of A., no time being fixed for the duration of the contract, and the kind and extent, the compensation for repairs, and for the support of A. not being fixed, is a contract partly in writing and partly in parol, and in a suit for the support of A. it need not be declared on as a contract in writing, but the complaint may be on an account.

SAME.—Effect of Rescission.—When, after supporting A. for a time, the writing was by agreement of the parties rescinded and destroyed, it did not destroy the right to recover for the services already rendered.

SAME.—Evidence.—Where a contract has been thus destroyed, its contents may be proved by parol.

ACCOUNT.—Complaint.—Breach.—A complaint on an account, averring that the defendant was indebted to the plaintiff upon it, referring to a bill of particulars filed, which then follows with "leaving due and unpaid \$230," sufficiently shows that the account is due and unpaid.

From the Madison Circuit Court.

J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr.,
for appellant.

H. D. Thompson and T. B. Orr, for appellee.

ZOLLARS, J.—Action by appellee against appellant, for work and labor, and for boarding and caring for the mother of the parties. Following the statements of the ground of liability, and that a bill of particulars is filed with the complaint, is the statement: "Leaving due and unpaid two hundred and thirty dollars," etc. This sufficiently shows that the amount of the several items is due and unpaid. It would be a forced and unnatural construction to confine the declaration to the last item mentioned in the complaint.

The evidence shows that at the time appellant employed appellee to render the service, a writing was executed. This is called by counsel and witnesses a written contract. After appellee had rendered most of the services for which a recovery is sought in this action, he surrendered the paper to appellant, with a statement that he could render no further ser-

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| 96 | 184 |
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| 96 | 184 |
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vices under it. To this appellant consented, and, with the acquiescence of appellee, destroyed the paper. The surrender of the paper, with the accompanying statements, put an end to the contract from that time, but it was not such a rescission as to defeat appellee's right to recover for the services already rendered.

The paper, having been thus destroyed, of course, could not be produced in evidence, and hence it was not error to admit oral testimony of its contents, if its contents were material.

From the oral testimony of its contents, we learn that by the writing appellant let to appellee a farm, which belonged to the mother, for one-half of the corn that might be raised, and agreed to pay him for all necessary repairs upon it, and for boarding and caring for the mother.

As to how long the contract should exist, the kind and extent of the repairs that might be made, the compensation to be paid therefor, and for the care and support of the mother, the paper contained no stipulation. As to all these, the rights of the parties had to be determined by resort to oral testimony. The contract, therefore, was not complete as a written contract. The contract between the parties was partly in writing and partly in parol, which for most, if not all, legal purposes, is treated as a parol contract. *High v. Board, etc.*, 92 Ind. 580; *Board, etc., v. Shipley*, 77 Ind. 553; *Board, etc., v. Miller*, 87 Ind. 257; *Stagg v. Compton*, 81 Ind. 171; *Pulse v. Miller*, 81 Ind. 190.

The contract is not such a contract as must be specially declared upon to authorize a recovery. The court below, therefore, was not in error in admitting evidence of it, under the averments of the complaint, which is in the nature of a common count.

If appellant undertook to pay for the repairs upon the mother's farm, he was bound by such undertaking, whether he had charge and control of the farm or not. Evidence, however, of such charge and control for a number of years

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was competent, as tending to corroborate appellee's testimony as to such undertaking.

Appellee testified that the mother refused to return to appellant at the time the farm and papers were surrendered; that he was compelled to procure her support in the family of a relative, by the name of Johnson, and that at that time appellant verbally agreed to pay him for such support. The evidence of Johnson, therefore, as to how long he had kept her, and that appellant told him he was willing to pay for such support, was competent, in corroboration of appellee's testimony.

We can not reverse the judgment upon the weight of the evidence. It is not very conclusive, but tends to sustain the verdict of the jury.

The judgment is affirmed, with costs.

Filed June 6, 1884.

No. 11,235.

MAXWELL v. VAUGHT.

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| 150 | 101 |
| 152 | 208 |

JUDGMENTS.—*Lien.—Priority.—Trust.—Lands.—Execution.*—Judgments are by statute liens on lands held in trust for the judgment debtor in their chronological order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where the plaintiff in the senior judgment is not a party.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.

J. B. McFadden, for appellee.

BICKNELL, C. C.—The appellant brought this suit against the appellee. The complaint was in two paragraphs. The first demanded the possession of land, damages for its wrongful detention, and that the title thereto be quieted. The second paragraph demanded partition.

The answer was the general denial.

The issues were tried by the court, who made a special

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finding of the facts and stated conclusions of law thereon in favor of the defendant, the plaintiff excepted to the conclusions of law. Judgment was rendered for the defendant; the plaintiff appealed. Error is assigned upon the conclusions of law.

The special findings were substantially that James Yohe owned the land in dispute, and exchanged it with Jacob Halfacre for other land; that Halfacre made him a deed and put him in possession of the other land; that Halfacre took possession of the land in dispute, but Yohe, having no other interest in it, retained the title thereto, and agreed that whenever Halfacre should find a purchaser, he would convey it to such purchaser for the benefit of Halfacre; that Halfacre, having made valuable improvements on the land in dispute, died in possession of it in September, 1878; that said exchange of lands was made in December, 1876; that by his last will Jacob Halfacre devised to his son Philip Halfacre the undivided one-fifth of said land, and devised the remainder to other devisees, and that from December 6th, 1876, to the death of Jacob Halfacre in September, 1878, said Yohe held said land in trust for Jacob Halfacre, and afterwards held it in trust for the benefit of said Philip Halfacre and said other devisees, and that Yohe had no other interest in said land than as such trustee; that said Philip Halfacre had remained insolvent since his father's death, and had no property except his interest as such devisee; that in March, 1872, the plaintiff and William H. Fry and William B. Thurston recovered a judgment against said Philip in the court of common pleas of Shelby county for \$324.50, of which judgment the plaintiff, before March 15th, 1880, became sole owner; that on June, 28th, 1880, the Shelby Circuit Court, after due notice to Philip Halfacre, and on proof that said judgment was wholly unpaid, gave leave to issue execution thereon, and that in said proceeding said court rendered judgment that said undivided one-fifth of said land was held in trust by said Yohe for said Philip Halfacre from the time of

* Maxwell v. Vaught.

his father's death in September, 1878, and was subject to the lien of plaintiff's said judgment; that the plaintiff afterwards issued execution on said judgment, which was levied on said undivided one-fifth, and the said one-fifth was duly sold by the sheriff to the plaintiff for \$300, and the sheriff made a deed to the plaintiff therefor on the 13th of January, 1883; that the rents and profits of the eighty acres, of which said one-fifth is part, are of the value of \$150 for each of the last two years; that on July 2d, 1876, Alfred C. Thompson obtained a judgment against said Philip Halfacre, before a justice of the peace, for \$41.33, and on the 22d of January, 1878, Peter Wallace recovered a like judgment for \$75.45, and assigned it to said Alfred C. Thompson, who filed a transcript of each of said judgments in the clerk's office of said Shelby county, which were there duly recorded and docketed, together with certificates of the proper officers, showing that executions on said judgments had been duly issued and duly returned *nulla bona*; that Harvey C. McClelland, on December 6th, 1878, obtained a judgment in the Johnson Circuit Court against said Philip Halfacre for \$408.08, a duly certified transcript of which was duly filed and recorded in said Shelby county; that in December, 1878, said Alfred C. Thompson filed in the Shelby Circuit Court his complaint against said Philip Halfacre and others to subject the equitable interest aforesaid of said Philip Halfacre to execution and sale to satisfy his judgments aforesaid, the said Thompson averring that he had an equitable lien on said undivided one-fifth part; that on the 19th of December, 1878, said Harvey C. McClelland filed a like complaint upon his judgment aforesaid; that upon said complaints the said court rendered separate judgments in favor of said Thompson and in favor of said McClelland, and that they each had the lien they claimed on the equitable interest of said Philip Halfacre in said one-fifth of said eighty acres, and that said equitable interest should be sold to satisfy said liens; that under said judgments the sheriff duly sold said equitable in-

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terest to Alfred C. Thompson, who afterwards assigned his certificate of sale to Gabriel M. Overstreet, who obtained the sheriff's deed for said equitable interest on the 7th of September, 1880, which afterwards, by deed, was conveyed to the defendant in the present suit, William M. Vaught; that in the plaintiff Maxwell's suit aforesaid to establish said trust, neither Alfred C. Thompson nor Harvey McClelland were parties, and that in said suits of Alfred C. Thompson and Harvey McClelland to subject said equitable interest, said John M. Maxwell was not a party.

The conclusions of law upon the foregoing facts were:

1. That said equitable interest of said Philip Halfacre was never subject to execution to satisfy the judgment held by the appellant John M. Maxwell, and that said judgment was not a lien on said equitable interest.

2. That the said judgments of Thompson and McClelland did become liens upon said equitable interest, and that such interest was properly sold to satisfy said judgments.

3. That upon such last mentioned sale said Philip Halfacre was divested of all his said equitable interest except the right to redeem the same from said sale.

Upon an exception to conclusions of law upon facts specially found the facts are taken to be correctly found for the purpose of determining the validity of the exception. *Gregory v. Van Voorst*, 85 Ind. 108. Where the facts are not correctly found, the remedy is a motion for a new trial, for the reason that the finding is not sustained by sufficient evidence. *Cruzan v. Smith*, 41 Ind. 288. In this case the court, after finding that one undivided fifth of Jacob Halfacre's eighty acres was devised by him to Philip Halfacre, and that the remaining four-fifths were devised by said Jacob to his other descendants, continues thus: "And that said real estate was held by the said James Yohe in trust for Jacob Halfacre from the 6th day of December, 1876, to his death in September, 1878, and from that date the same was held by said Yohe, in trust for the benefit of Philip Halfacre and the other legatees

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under the will of Jacob Halfacre, deceased, and that said James S. Yohe had no other interest in said land than as trustee for said legatees."

Such a finding means that the trust was a valid trust. Then the question arises, what rights have the judgment creditors of the *cestui que trust* against lands thus held in trust for him? The law in force while the property in controversy was thus held in trust was the same as the law now in force. It provided that all lands of the judgment debtor, whether in possession, remainder or reversion, and all lands, or any estate or interest therein, holden by any one in trust for, or to the use of, another, shall be liable to all judgments, and to be sold on execution against the debtor owning the same, or for whose use the same is holden. R. S. 1881, section 752. Ever since the enactment of this statute in 1852, lands held in trust have been liable to sales on execution issued on judgments against the *cestui que trust*, and where there are several such judgments the oldest judgment is the first lien.

The special finding shows that the date of the appellant's judgment against the *cestui que trust* was March 6th, 1872; that in June, 1880, he obtained a decree of court, declaring that the land in controversy was held in trust for said Philip Halfacre, and also obtained leave of court to issue execution thereon, which was issued in December, 1881, and that in January, 1882, the appellant, at the execution sale, bought said land so held in trust and received the sheriff's deed therefor in January, 1883. The appellant thereby acquired a valid title as against all subsequent judgments.

The special finding shows that the judgments of Thompson and McClland, under which the appellee claims, were not a lien until December, 1878, more than six years after the date of the appellant's judgment. They supposed that Philip Halfacre's interest was an equitable interest which could not be reached without the aid of a court of equity, and they commenced proceedings in equity, and obtained a decree in equity in June, 1879, that such equitable interest should be

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sold on their judgments, and the same was so sold to Thompson who assigned his certificate of sale to Overstreet under whom the appellee claims. The sale to Thompson was earlier than the sale to the plaintiff, but the plaintiff had the prior lien. R. S. 1881, section 608. The plaintiff was not a party to these proceedings in equity and was not bound thereby.

There are equitable interests in land which are not subject to execution; this was decided in the case of *Modisett v. Johnson*, 2 Blackf. 431, where it was held that the interest of a party who holds a title-bond for land, is not subject to execution, and see, also, *Orth v. Jennings*, 8 Blackf. 420; *Doe v. Cutshall*, 1 Ind. 246; *Dickerson v. Nelson*, 4 Ind. 160; *State Bank v. Macy*, 4 Ind. 362; *Russell v. Houston*, 5 Ind. 180; *Davis v. Cumberland*, 6 Ind. 380; *Hutchins v. Hanna*, 8 Ind. 533; *Gentry v. Allison*, 20 Ind. 481; *Jeffries v. Sherburn*, 21 Ind. 112; *Terrell v. Prestell*, 68 Ind. 86. Most of these cases were decided under statutes existing prior to 1852. All of them affirm the doctrine that in general mere equitable estates in land are not subject to execution, but none of them hold that estates held in trust for another, such as the special finding in this case declares, can not be levied upon. The finding is that "from that date the same was held by said Yohe in trust for the benefit of Philip Halfacre and the other legatees, and that said Yohe had no other interest in said land than as trustee." To hold that land so held is not liable to an execution against the *cestui que trust*, would be directly in conflict with the existing statutes, above cited. See *Tevis v. Doe*, 3 Ind. 129. In this case PERKINS, J., said: "Our statute * * enacts, * * that 'lands, * * holden by any one in trust for or to the use of another,' shall be liable to be sold on execution, etc. Now, if Joel Tevis had fully paid the consideration for this land to Hewitt, and was entitled to a deed, but had the same conveyed for his own use to Colliver, Colliver held the land simply in trust for said Joel, and it was subject to the execution in this case."

In *Pennington v. Clifton*, 11 Ind. 162, PERKINS, J., said,

substantially, that the land may be regarded as subject to execution under that clause of the statute which enacts that lands fraudulently conveyed are so subject, and probably, also, under that clause which enacts that lands holden by any one in trust for or to the use of another shall be so subject.

It may be observed that under the statute, section 752, *supra*, lands held in trust for another, and lands fraudulently conveyed, stand upon the same footing, and are equally liable to execution.

In *Wilson v. Rudd*, 19 Ind. 101, DAVISON, J., said, after citing the statute; "These provisions, it seems to us, make every interest which a judgment debtor has in real estate, liable to execution." In *Hubble v. Osborn*, 31 Ind. 249, the court referred with approbation to the case of *Tevis v. Doe*, *supra*. In *Evans v. Feeny*, 81 Ind. 532, this court said: "There had been no fraudulent conveyance from Peter Feeny, and none had been made by William to any third party, nor did he hold the title in trust for Peter." In the case of *Hanna v. Aebker*, 84 Ind. 411, this court held that in case of a fraudulent conveyance of land, the land is subject to the execution of any creditor sought to be defrauded, without resort to equity, and that where one of several creditors proceeds in equity to subject such lands to his execution, he obtains no priority over the others. This case is exactly analogous to the present case, because, under the statute, lands held in trust and lands fraudulently conveyed are in the same condition precisely, as to liability to be taken in execution. If, where lands are fraudulently conveyed, a judgment creditor acquires no priority by proceeding in equity, it follows, inevitably, that where lands are held in trust a proceeding in equity will give no priority. What we decide is that where, as in this case, a special finding shows that lands are held in trust for another, and that the holder of the lands has no other interest than as trustee, judgments against the *cestui que trust* bind the land in the order of their priority, and a junior judgment creditor will gain no priority by a proceeding in equity to subject the in-

City of Terre Haute v. Beach *et al.*

terest of the *cestui que trust* to his judgment. The court below, therefore, erred in its conclusions of law.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to state conclusions of law in favor of the appellant and in accordance with the foregoing opinion.

Filed June 6, 1884.

No. 8409.

CITY OF TERRE HAUTE v. BEACH ET AL.

CITY.—*Annexation of Territory.*—*Jurisdiction.*—*Collateral Attack.*—A complaint to enjoin a city from exercising jurisdiction over territory annexed claimed that the proceedings to annex were void: 1. Because the petition for annexation prayed for the annexation of other lands also, which the county board refused to annex; 2. Because no notice of the intention to present the petition was given by publication for thirty days.

Held, that the complaint did not show that the board had not jurisdiction of the proceedings, and therefore the annexation could not be attacked collaterally.

SAME.—*County Commissioners.*—*Defective Notice.*—Where there is some notice, of a legal form, and that notice is adjudged sufficient, the proceeding is not void, although the notice may be defective.

From the Vigo Circuit Court.

I. N. Pierce, J. W. Harper and J. M. Allen, for appellant.
J. G. Williams and W. Mack, for appellees.

ELLIOTT, J.—The appellees' complaint alleges that the board of commissioners of Vigo county, on the petition of the city of Terre Haute, ordered lands belonging to them to be annexed to the city, and charges that this judgment was void, because, to borrow the language of the pleading, "no petition was ever presented to the board of commissioners for the annexation of the territory described in the order of

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| 96 | 143 |
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the board, but the petition presented at said time to said board included and described other lands, and which said board refused to annex to said city, and granted only a part of said petition." It is clear, under the now settled rule, that this statement supplies no ground for an injunction. Many cases establish the rule that where the petition is sufficient on its face to confer jurisdiction of the subject-matter, the proceedings based upon it, although erroneous, can not be overthrown by injunction. The appropriate remedy in such cases is by appeal. Where there is jurisdiction no irregularities or errors will render the proceedings void, and it is only void proceedings that can be collaterally assailed. *Town of Cicero v. Williamson*, 91 Ind. 541; *Heagy v. Black*, 90 Ind. 534; *Grusenmeyer v. City of Logansport*, 76 Ind. 549; *Caskey v. City of Greensburgh*, 78 Ind. 233; *Board, etc., v. Pressley*, 81 Ind. 361; *Green v. Elliott*, 86 Ind. 53.

It is also averred that "no notice by publication of the intention to present said petition to said board of commissioners, was given thirty days previous to December 5th, 1872." By the law in force when the annexation proceedings were had, it was provided that the "council shall give thirty days' notice, by publication in some newspaper of the city, of the intended petition" (1 R. S. 1876, p. 311), and if the complaint had directly charged that no notice at all had been given, it would perhaps have been good, because, as the proceeding affected the personal and private rights of the appellees, they were entitled to the notice, and this not having been given the board of commissioners did not acquire jurisdiction of the person. *Town of Cicero v. Williamson, supra.* Notice in some form in such cases is required, and a statute not providing for it is probably unconstitutional. *Campbell v. Dwiggins*, 83 Ind. 473. However this may be, it is clear that the complaint is insufficient. For aught that appears more than thirty days' notice may have been given. The presumption is in favor of the acts of public officers, and, until the contrary is shown, it must be presumed that they have done their

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duty. There is nothing here to show that notice was not given for a much longer period than thirty days. It is, indeed, impliedly conceded by the complaint that some notice was given, and the rule is that where there is some notice, although a defective one, and the commissioners have adjudged it sufficient by acting upon it, there can be no successful collateral attack. *Oppenheim v. Pittsburgh, etc., R. W. Co.*, 85 Ind. 471; *Stout v. Woods*, 79 Ind. 108; *McAlpine v. Sweetser*, 76 Ind. 78; *Hume v. Conduitt*, 76 Ind. 598; *Muncey v. Joest*, 74 Ind. 409.

Judgment reversed.

Filed Dec. 13, 1883.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—In the brief of the appellees the question for our decision was thus stated: "The only question presented by this record is, was the complaint subject to demurrer?" This we accepted as a correct statement, and fully considered the question presented, and we certainly gave the appellees no cause for complaint in acting upon their own statement.

It is said in the brief on the petition for rehearing, that we were in error in stating that the complaint averred that an order of the board of commissioners was made annexing lands to the city of Terre Haute. That we were not in error is apparent from the following statement of the complaint: "And plaintiffs say that the board of commissioners of Vigo county, pretending to act under sections 86 and 87 of the law of 1867, made an order annexing to the city of Terre Haute certain territory, in said order described, in twelve parcels," and this is followed by a description of the lands ordered annexed. But if this extract does not sufficiently show that we were right, then the following surely does: "And plaintiffs say that said pretended annexation of land to the city of Terre Haute is illegal and void, and that the acts of said city

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in assessing said lands for taxation, and the acts of said treasurer in attempting to enforce the collection of taxes, are unlawful and wholly without right; that, in truth and in fact, said lands are not within the city of Terre Haute, because plaintiffs show that no petition was ever presented to the said board of commissioners asking for the annexation of the territory set out in the order of the board, but the petition presented at said time to said board included other lands, described therein, which the board refused to annex to said city, and granted only a part of said petition." This, certainly, shows that the board ordered the lands of the appellees annexed, but refused to order the annexation of other lands.

The theory on which the pleading is founded shows clearly that we correctly read the complaint, for the theory is that because all the lands were not annexed none were, the theory is not that the lands of the parties described in the order were not ordered to be annexed, but that other lands described were not annexed.

We find in the concluding part of the complaint this clause: "And that the defendants be perpetually enjoined from attempting further to assess the same under the order of said board," and the context clearly shows that the word "same" refers to the lands of the appellees, described in the order.

Counsel are right in saying that we did not mean to hold that the lands not within a city could be taxed by the municipal authorities, but they are wrong in assuming that we did not correctly construe their complaint.

The pleading shows that a petition was presented to the board of commissioners, and that it described the lands of the appellees and other lands, and this petition was sufficient to invoke the jurisdiction of the board in the particular case, and this was all that was necessary to protect the proceedings against a collateral attack. The statute gives the board general jurisdiction over the subject, and the petition called that jurisdiction into exercise in this instance. The fact that the petition may not have been sufficient in form or sub-

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stance, does not affect the question of jurisdiction. The power to determine whether a petition is or is not sufficient is itself jurisdiction. In *United States v. Arredondo*, 6 Peters, 691, it was said: "The power to hear and determine a cause is jurisdiction; it is '*coram judice*,' whenever a case is presented which brings this power into action." In the well considered case of *Board, etc., v. Markle*, 46 Ind. 96, this doctrine was applied to the commissioners' court. If the petition is such as shows that the court has general jurisdiction of the subject-matter, then there is jurisdiction in the particular case, whether the petition is or is not sufficient to entitle the petitioners to the relief sought. The question of jurisdiction does not depend upon the sufficiency of the petition as the statement of a cause of action, but depends upon whether it does or does not state facts showing that the court in which it was filed has jurisdiction over the general subject, and that it may properly exercise that jurisdiction over the particular case made by the petition. In *Morrow v. Weed*, 4 Iowa, 77, it was said: "If there be a petition, or the proper matter of that nature, to call into action the power or jurisdiction of the court, the sufficiency of it can not be called in question collaterally. This is for the appellate power only. If there be a notice or publication, or whatever of this nature the law requires in reference to persons or other matters, its sufficiency can not be questioned collaterally. Of course, this means a notice coming within the legal idea and range of such a matter. An absurdity could not be permitted to pass." *Smith v. Engle*, 54 Iowa, 265. The cases cited from our own reports, in the opinion heretofore delivered, very clearly show the rule as it has long existed in this State.

The petition in this case showed that the general subject was one over which the commissioners had jurisdiction, and as it described real estate it showed that the case was one in which that general power was properly called into action. The failure to accurately describe the land may have been a

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defect affecting the sufficiency of the petition as to the statement of a cause of action, but it was not such a defect as deprived the board of jurisdiction. The petition called into exercise the power of the commissioners' court, and as that tribunal had jurisdiction, the errors or irregularities in the proceedings can not be made available otherwise than by appeal.

It is now well established, although there has been some contrariety of opinion upon the subject, that in all cases where the commissioners' court has jurisdiction of the general subject, and that jurisdiction is brought into exercise in the particular instance, the judgment will be sustained as against all collateral attacks. There are strong reasons for the rule, as shown by the cases heretofore referred to. Another reason may here be given, and that is this, the public have a right to the prompt and speedy settlement of questions affecting public interests, and by requiring one who is dissatisfied with the judgment of the board of commissioners to appeal this result is secured. Again, if there are errors or irregularities, advantage should be taken of them before rights have been acquired by the public or by private individuals. It is far better in such a case as the present, that property owners should be required to appeal and avail themselves of all objections that may exist, rather than wait until the municipal authorities have laid out streets and made public improvements, and then obtain an injunction. Still another reason supports our now established rule, and that reason is that the requirement that persons aggrieved by the judgment of the inferior tribunal shall appeal gives stability to the judgments of the commissioners, represses litigation and enables those who desire to act upon the judgments of the commissioners to act with knowledge and confidence.

Petition overruled.

Filed June 6, 1884

Wills v. Browning et al.

No. 11,426.

WILLS v. BROWNING ET AL.

JUDGMENT.—*Default.*—*Relief From.*—*Set-Off.*—Relief from a judgment by default will not be given to a party, under section 396, R. S. 1881, merely to enable him to avail himself of a set-off.

From the Bartholomew Circuit Court.

W. Dixon and P. C. Woodburn, for appellant.

J. B. Reeves and C. S. Baker, for appellees.

BICKNELL, C. C.—The appellees Browning and Sloan obtained a judgment by default against the appellant, and had an execution issued thereon to the appellee Thompson, who was the sheriff of the county.

The appellant brought this suit against the appellees to set aside the judgment and prevent the levy of the execution.

The defendants jointly demurred to the complaint for want of facts sufficient. The demurrer was sustained; the plaintiff refused to amend; judgment was rendered against him, and he appealed. The error assigned is sustaining said demurrer.

The complaint avers that Browning and Sloan, on September 23d, 1883, recovered against the plaintiff a judgment for \$307.78 for goods sold and delivered; that said judgment was rendered by default, upon the sheriff's return of service by leaving a copy of the summons at the last and usual place of residence of said Wills, on September 4th, 1883; that an execution on said judgment is now in the hands of said sheriff, who is about to levy the same upon the property of said Wills subject to execution, which is of the value of \$1,000; that said plaintiff, when said suit was commenced, and when said judgment was rendered, had, and still has, "a meritorious defence to the matters in said complaint set forth, and a good and legal cause of action against the plaintiffs therein, in this, to wit, that at said time said Browning and Sloan were, and still are, indebted to said Wills in the sum of \$250 for goods, viz.,

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fifty cases of wine at \$5 per case, sold and delivered by said Wills to them;" that if the plaintiff had known that such suit was pending against him, he would have pleaded said indebtedness as a set-off, and will plead said set-off if said default be set aside; that he did not move to set aside said default at the term at which said judgment was rendered, because during all of that term he was ignorant of the same; that said default and judgment were taken against him through his inadvertence, surprise, mistake and excusable neglect, in this, that he had no knowledge of the pendency of said suit, and no knowledge of said default and judgment until October 26th, 1883; that said default was entered on the 14th of September, 1883; that he lives in a house containing three front rooms and three back rooms, but he and his family "remain and dwell in said three back rooms;" that he was absent from home except at nights from the 3d until the 14th day of September, 1883; that said sheriff left the copy of said summons at his said house by placing the same under the front door of the parlor, which was one of said three front rooms; that plaintiff was not in that room from the 4th to the 14th day of September, 1883; that neither the plaintiff nor any of his family has ever seen said copy of summons, nor has the plaintiff ever known or heard of the same until after the issue of the execution as aforesaid. The complaint was verified by affidavit.

The last clause of section 396, R. S. 1881, which is the same as the last clause of section 99, 2 R. S. 1876, p. 82, provides that the court "shall relieve a party from a judgment taken against him, through his mistake, inadvertence, surprise, or excusable neglect * * * on complaint or motion filed within two years." In the construction of this statute it is held that the party applying for relief thereupon must show by affidavit that he has a meritorious defence. *Lake v. Jones*, 49 Ind. 297; *Bristor v. Galvin*, 62 Ind. 352.

And a complaint, seeking relief against a judgment by default, must show the nature of the cause of action on which the judgment was rendered, and a pertinent and sufficient

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defence thereto. See *Lee v. Basey*, 85 Ind. 543. The facts constituting the defence must be stated. *Frost v. Dodge*, 15 Ind. 139; *Yancy v. Teter*, 39 Ind. 305. It has been held that where a party has a defence to the action, and without fault of his had no actual notice of its pendency, until after the rendition of the judgment, his omission to make his defence is excusable. *Zerger v. Flattery*, 83 Ind. 399. But in the complaint under consideration, the plaintiff seeks relief in order that he may plead a set-off, and the question arises whether a set-off is a meritorious defence to the action.

It will be observed that this showing of a good defence on the merits is not required by the statute, section 396, *supra*, but the courts, in the exercise of their equitable powers, have declared that the relief mentioned in section 396 can not be had without a showing by affidavit that the applicant has a good defence on the merits.

Defences are either in denial or in confession and avoidance, but a set-off neither denies, nor confesses and avoids, the cause of action; therefore, at common law, there was no such thing as a plea of set-off, and the statutes which authorize such pleas have invested the common law courts with powers, and have engrafted upon common law suits proceedings, which belonged originally to courts of equity. The effect of these statutes is that in certain actions the defendant may present, by way of set-off, certain claims of his against the plaintiff, and have them tried and determined whether the plaintiff proceeds to the trial of his claim or not, but these claims of the defendant, thus introduced under the statute, are not defences attacking the merits of the plaintiff's claim; they are not defences at all, and are not so treated, either in our civil code or in judicial decisions.

The language of the code is, in section 347, R. S. 1881, that the answer shall contain: 1. A denial, etc. 2. A statement of any new matter constituting a defence, counter-claim or set-off, etc. 3. The defendant may set forth in his answer as

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many grounds of defence, counter-claim and set-off as he may have, etc.

Defences and set-offs are here mentioned according to their true nature as distinct pleadings, and so they have always been regarded by this court. Thus in *Boil v. Simms*, 60 Ind. 162, it was said by Howk, J.: "A set-off, strictly speaking, is not a defence to the action in which it may be filed; it is simply a cross action, and can only be interposed * * by the express authority of the statute." And again, "We think, that the provisions * * are applicable only to such answers as set up causes of defence to the cause of action sued upon, and not to answers by way of set-off, which do not question the sufficiency of the plaintiff's cause of action." So, in *Daly v. National Life Ins. Co.*, 64 Ind. 1, this court said: "This paragraph was a cross action, in the nature of a set-off against the appellee's cause of action. It was not, and did not purport to be, a defence to the suit of the appellee." And in this last case it was held that the proper form of demurring to such a paragraph was for want of facts sufficient to constitute a cause of action. See, also, to the same effect, *Huston v. Vail*, 84 Ind. 262, and *Anderson, etc., Ass'n v. Thompson*, 88 Ind. 405. Again, in *Goble v. Dillon*, 86 Ind. 327 (44 Am. R. 308), this court, referring to section 34, 2 R. S. 1876, p. 612, in relation to pleadings before a justice of the peace, says: "This statute excepts set-off as a matter of defence, which it is not." See, also, *Campbell v. Routt*, 42 Ind. 410. Under these decisions a set-off can not be regarded as a meritorious defence to the action, and the relief demanded under section 99, *supra*, can not be had without a showing that the applicant has a meritorious defence to the action. The statute is peremptory and imposes no such condition, yet it authorizes the court to grant equitable relief, and therefore authorizes equitable considerations, but there is no equity in relieving against a judgment suffered by inadvertence or excusable neglect, when the party has no defence against it and the debt ought to be paid; if he should plead against a valid claim, he would be making

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costs against himself for nothing, and the courts will not do what is alike useless and unjust, and this is the real foundation of the rule established by the courts, namely, that there is no equity in granting the relief provided by the statute unless the applicant can show a good defence on the merits.

The question whether relief ought to be granted under section 396, *supra*, where the applicant shows merely that he desires to plead a set-off to a part of the cause of action for which the judgment was rendered, has never been presented to this court, but the Supreme Court of Illinois has determined a kindred question. In *Bowman v. Wood*, 41 Ill. 203, that court said: "The meritorious grounds relied on are, that the appellant has a cross demand against appellee. If this be true, what prevents him from suing and recovering in an action against appellee? * * We do not see that the court below was called on to set aside the default, as it might have been, if the set-off would have been lost, or could not be otherwise recovered." This decision was cited and approved and followed in *Palmer v. Harris*, 98 Ill. 507. The statute of Illinois, under which these decisions were made, is not peremptory like our section 99, *supra*, but this difference does not affect the question. Whether such a statute be peremptory or not, there is no equity in setting aside a judgment properly obtained, where no defence on the merits is shown. The party who has obtained such a judgment ought not to be deprived of it without reason, and there is no reason in favor of the debtor why such an application should be granted, because he could have brought suit immediately upon his set-off, and upon showing the pendency of such suit he might, on a proper application to the court, have obtained an injunction staying proceedings on the judgment against him, until, at the determination of his own suit, his judgment could be offset against the other. This remedy is still open to the appellant. He having such a complete remedy, his present application, which ignores the well established distinction between a set-off and defence to the action, and proceeds upon

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the false supposition that there is no substantial difference between the two, and to that extent is in conflict with the decisions of this court, *supra*, ought not to be granted. If the complaint had shown that the set-off would be lost by delay, or that other circumstances created an equity in favor of the appellant, a different question would arise. There was no error in sustaining the demurrer to the complaint. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed June 4, 1884.

No. 11,232.

BECKER v. BECKER ET AL.

WILL.—*Intention of Testator.—Rule of Construction.*—In construing a will the primary rule is to ascertain, and, if possible, give effect to, the intention of the testator; and this intention is to be ascertained from an examination of all the provisions of the will bearing upon the subject of inquiry.

From the Shelby Circuit Court.

T. B. Adams and L. T. Michener, for appellant.

B. F. Love, A. Major and H. C. Morrison, for appellees.

Howk, J.—The only question in this case depends for its decision upon the construction which must be given to the last will and testament of Samuel Becker, deceased. This will appears to have been duly executed and attested on the 10th day of February, 1882, and it was admitted to probate by and before the clerk of the court below on the 15th day of February, 1882. The following is a copy of such will:

“In the name of the Benevolent Father of all, Samuel Becker, of Hendricks township, State of Indiana, do make and publish this my last will and testament.

Becker v. Becker et al.

"Item 1. I give and devise to my beloved wife, Mary Becker, in lieu, one-third of the money which my farm brings, for which I want it sold. After my just debts are paid I give Henry Becker his book-account and note for his share. Solomon Becker, George Becker, John Becker, Jacob Becker, Christian Becker, my sister Susan Trion, to children of my brother Daniel Becker, for which I want divided equal between the above brother's heirs, and my brothers and sister.

"I do hereby nominate and appoint John Bensheimer and William H. Runyan my administrators of this my last will and testament, hereby authorizing and empowering them to compromise, adjust, release and discharge, in such manner as they may deem proper, the debts and claims due me."

(Signed) "SAMUEL BECKER." [SEAL.]

The executors named in the will qualified according to law, and entered upon the discharge of the duties of their trust, and, after due administration had, they made and filed in the clerk's office below their final settlement report. It was shown by the executors that they had surrendered to Henry Becker his book-account of \$2, and his note for \$64.40, executed to the testator on September 16th, 1875, and due four months after date, for "his share" of the testator's estate. It was further shown by the executors that they had paid all the debts owing by their testator and all the expenses of the administration of his estate, and that there remained a balance of their testator's estate amounting to \$704.02, which they paid into court for distribution among his legatees under the will and the order of the court.

The appellant, Henry Becker, claims that he is entitled, under the will, to an equal share with the other legatees named therein, the appellees in this court, of the balance for distribution. On the other hand, the appellees claim that when the executors surrendered to the appellant "his book-account and note," he got "his share" in full of the testator's estate, and had no interest whatever, under the will, in the balance of such estate for distribution, and that such balance was to

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be divided equally between them, the appellees, to the entire exclusion of the appellant from any share therein. The question in dispute was decided by the trial court in favor of the claim of the appellees that the balance for distribution of the decedent's estate should be divided equally between them, to the entire exclusion of the appellant from any share therein.

Did the circuit court err in this decision? This is the only question we are required to decide, and this question, as we have already said, depends for its proper decision upon the construction which must be given to the provisions of the last will and testament of Samuel Becker, deceased, heretofore set out in this opinion. In *Lofton v. Moore*, 83 Ind. 112, the court said: "In the construction of the will, it was the duty of the court to ascertain and carry into effect, if possible, the intention of the testator, in regard to the matter under consideration. This intention was to be ascertained, not from any single item or clause, but from all the provisions of the will having reference to the subject of the inquiry. *Kelly v. Stinson*, 8 Blackf. 387; *Craig v. Secrist*, 54 Ind. 419; *Fraim v. Millison*, 59 Ind. 123; *Tyner v. Reese*, 70 Ind. 432." See, also, *Hinds v. Hinds*, 85 Ind. 312, where the same rule of construction as applicable to the interpretation of last wills is declared and approved.

Applying this rule of construction to the will under consideration in the case in hand, we have no difficulty in reaching the conclusion that the trial court did not err in its decision. In such will the testator used this language: "After my just debts are paid I give Henry Becker his book-account and note for his share." His share of what? From all the provisions of the will construed together, as they must be, there can be certainly but one answer to this question. After first making provision for his wife, and then for the payment of his "just debts," the testator next provides for the distribution of the residue or surplus of his estate, among his living brothers and sister, and the children of his deceased brother. In making this distribution, he first gives the appellant Henry

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Becker "his book-account and note for his share." Then, after naming his other living brothers and sister, and the children of his deceased brother, the testator expresses his wish that the balance of his estate be "divided equal between the above." Manifestly, this is what the testator intended, that all his living brothers and sisters, and the children of his deceased brother, should share equally, as nearly as might be, in the surplus of his estate after his widow had received her portion, and after the payment of his just debts. After the appellant had obtained from the executors what was denominated in the will as "his share," and what was about equal to any share, under the will, in the surplus of the testator's estate, he then sought in this proceeding to obtain a share also in such surplus. The decision of the trial court was against the appellant, and we find no error in such decision.

The judgment is affirmed, with costs.

Filed June 6, 1884.

No. 11,023.

ROGERS v. COX.

CONTRACT.—Sale of Building.—License to Remove.—The sale of a building not permanently annexed to the land, with a right of removal, although the contract is verbal, justifies the purchaser, having complied with his part of the contract, in entering upon the land and removing the building.

SAME.—License.—The sale of personal property, by an owner of real estate, which can only be removed by entry thereon, thereby licenses the vendee to enter upon the land for the purpose of removal, and the license is irrevocable.

From the Henry Circuit Court.

R. Warner, D. W. Chambers and J. S. Hedges, for appellant.
J. M. Brown, for appellee.

ELLIOTT, C. J.—The complaint of the appellant alleges that he is the owner of the land therein described, and that the appellee wrongfully entered upon it, and without right removed a large frame building.

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Rogers v. Cox.

The second paragraph of the answer alleges that the appellee bought the building of the appellant and entered on the land for the purpose of removing the building which he had purchased. A written contract is set forth showing the sale of the building to the appellee.

We regard this answer as sufficient. The appellant, having sold to the appellee property of which possession could only be obtained by an entry upon the land, impliedly licensed the latter to enter, and take possession of the property he had purchased. An owner of land, who sells property which can only be taken possession of by an entry on the land, can not deny the vendee's right to enter for that purpose. It would be a strange rule that would permit a man to sell property to another, and then prevent him from getting possession of it. The purchase of property, where the contract of sale is fully complied with by the vendee, vests in him a right which no subsequent act of the seller can take from him. The written contract set forth in this paragraph of the answer secured to the appellee a right to remove the building for which the appellant had accepted the stipulated price.

The third paragraph of the answer differs from the second in that it sets forth a verbal contract for the purchase of a building on the appellant's land, and avers that the latter had, as part of the contract, granted the appellee the right to remove the building. The answer is good because it justifies the alleged trespass by averring a parol license. It has been many times decided that a parol license is valid. There was an interest coupled with this parol license, which precluded the appellant from revoking it. *Buchanan v. Logansport, etc., R. W. Co.*, 71 Ind. 265, and cases cited. The rule upon this subject is this: where the license is coupled with an interest it can not be revoked, although a naked license may be. *Miller v. State*, 39 Ind. 267; *Snowden v. Wilas*, 19 Ind. 10; *Hodgson v. Jeffries*, 52 Ind. 334; *Nowlin v. Whipple*, 79

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Ind. 481; *Kipp v. Coenen*, 55 Iowa, 63; *Lee v. McLeod*, 12 Nev. 280; *Long v. Buchanan*, 27 Md. 502.

The sale of a building with the right of removal is not necessarily the sale of an interest in land within the meaning of the statute of frauds. In *Foy v. Reddick*, 31 Ind. 414, replevin was held maintainable for a house. In *Griffin v. Ransdell*, 71 Ind. 440, it was said: "A dwelling-house, although situated on the real estate of another, may, under some circumstances, be treated as personal property." It has been held by this court that an agreement made before the building is erected may make the structure personal property, and vest in the builder the right of removal. *Yater v. Mullen*, 23 Ind. 562; *Yater v. Mullen*, 24 Ind. 277; *Pea v. Pea*, 35 Ind. 387; *Young v. Baxter*, 55 Ind. 188; *Price v. Malott*, 85 Ind. 266; *Taylor v. Watkins*, 62 Ind. 511. A recent author says: "But if such erection is in pursuance of a license granted by the owner of the soil, then the annexation will not make the building or other structure a part of the realty. A conveyance of the land will not transfer the structure with it, but will operate as a revocation of the license, and compel the owner, within a reasonable time after such revocation, to remove the structure or lose his right of property therein." *Tiedeman Real Prop.*, section 2. If a building may be made personal property by an agreement entered into previous to its erection, it is difficult to see why the same character may not be impressed upon it by a subsequent agreement making sale of it and granting a right of removal. If the building should be torn down by the owner and the materials sold, it is clear that the sale would be of personal property and not of an interest in land, and we can perceive no reason for holding that a standing building is real estate, but after it has been demolished the material of which it was composed becomes personal property. *Keyser v. School District*, 35 N. H. 477. The reasonable doctrine is that where the effect of the contract between the parties is to impress upon the structure the character of personalty, it takes that character whether

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the contract was made before or after its erection, unless the structure is inseparably annexed to the land. Mr. Browne inclines to the view which we regard as the just one, for he writes: "Although the improvements put upon land, such as buildings and other erections, tillage and labor generally, may be so incorporated with the land itself as to be inseparable therefrom in fact, yet it would seem that they ought to be so far separately regarded as to be capable of a distinct purchase and sale by verbal contract." Browne Stat. of Frauds, section 233.

We are not to be understood as holding that the sale of a right or interest in a building may not be a sale of real estate. On the contrary, we have no doubt that where the house is to permanently remain on the land, then a sale of a right in it would be a sale of an interest in land within the meaning of the statute of frauds, if made by the owner of the land, though it would perhaps be otherwise if made by a tenant or licensee. But where the owner sells a building with the right of removal, he severs it from the land, and gives it the character of personalty; and, in impressing this character upon it, he takes it without the statute as effectually as if he had torn it down and sold the materials of which it was composed.

We need not decide what would be the rule in a case where it was made to appear that the structure was permanently annexed to the land. No such case is made by this record. The building is described in the complaint as a large frame building, and, for aught that appears, may not have been permanently annexed to the freehold. The fair inference is that it was not so annexed, because it was sold as personalty, and a license granted to remove it. The clear implication, therefore, is that it belonged to that class of buildings, as saw-mills and the like, which are easily susceptible of severance from the land on which they stand. It may be true that the word "house," in its ordinary legal meaning, signifies real property, but this meaning is by no means a fixed one. *Rogers v. Smith*, 4 Pa. St. 93; *Common Council v. State*, 5 Ind. 334; *Griffin v. Rans-*

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dell, *supra*. But the complaint in this case does not show that the structure sold by the appellant was a house, or structure, of a permanent character. It may have been a frame building of the most temporary character, as a booth, a shed, or the like, and we think there can be no doubt that parties may treat a structure of such a character as personal property, whether the contract impressing that character upon it is made before or after its erection. The cases do indeed go much farther, and lay down the rule in very broad and comprehensive terms. *State, ex rel., v. Bonham*, 18 Ind. 231; *Hinckley v. Baxter*, 13 Allen, 139; *Ham v. Kendall*, 111 Mass. 297; *Russell v. Richards*, 10 Maine, 429; *Tapley v. Smith*, 18 Maine, 12; *Pullen v. Bell*, 40 Maine, 314; *Keyser v. School District, supra*; *Coleman v. Lewis*, 27 Pa. St. 291. But all we are required to decide, and all we do decide upon this branch of the case, is, that where the building is not a permanent one and is not annexed to the freehold, and is sold with a right of removal, the contract, although verbal, will justify the purchaser, if he has fully complied with his contract, in entering and removing the building.

If there was any error in instruction No. 2 given by the court, it was in appellant's favor. A purchaser of a building, such as the evidence shows the one in controversy to be, has a right to remove it whether he was or was not in possession of the land at the time the purchase was made or the removal effected. It is a familiar elementary rule, that the grant of a principal thing carries with it all incidents, and under this rule the sale of a building standing on land necessarily implies a right to enter on the land and take the building. In *Sterling v. Warden*, 51 N. H. 217, it was said: "There are licenses which are irrevocable, though they relate to an entry upon and the occupation of land or real estate, and are by parol; as where, for instance, the license is directly connected with the title to personal property which the licensee acquires from the licenser at the time the license is given, where-

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by the license is coupled with an interest. Thus, where one sells personal chattels on his own land, and, before a reasonable time to remove them, forbids the purchaser to enter and take them, it was held to be a license which he could not revoke within such reasonable time. *Nettleton v. Sikes*, 8 Met. 34; *Wood v. Manley*, 11 Ad. & E. 34; *Parsons v. Camp*, 11 Conn. 525; *White v. Elwell*, 48 Maine, 360; 1 Washb. Real Prop. 401." It is a principle recognized in various forms that a right to do a thing upon another's land invests, by necessary implication, the person to whom it is granted with authority to enter and use the land so far as is reasonably necessary to effectuate the principal right. *Harlow v. Marquette, etc., R. R. Co.*, 41 Mich. 336; *Arrington v. Larrabee*, 10 Cush. 512. Judgment affirmed.

Filed May 27, 1884.

 No. 11,701.

ELDER v. THE STATE.

CRIMINAL LAW.—Prosecution by Information.—Abatement.—A plea in abatement to an information, alleging that after the filing of the affidavit and information, which was done in term time, the grand jury had been in session during the same time and been discharged, without returning an indictment against defendant, is bad on demurrer.

SAME.—Constitutional Law.—Title of Act.—Special Legislation.—The provisions of section 1679, R. S. 1881, are within the title of the act of which it is a part, and they are not special legislation within the meaning of sections 22 and 23, art. 4, of the State Constitution.

SAME.—Evidence.—Proof of the facts necessary to authorize a prosecution by information is unnecessary, where there is no plea in abatement putting them in issue. R. S. 1881, section 1733.

From the Clay Circuit Court.

S. W. Curtis, for appellant.

F. T. Hord, Attorney General, *S. M. McGregor*, Prosecuting Attorney, and *W. B. Hord*, for the State.

NIBLACK, J.—This was a criminal prosecution upon affidavit and information, under section 1679, R. S. 1881. The

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affidavit and information were both in two counts. The first count of each charged the crime of burglary, and each second count charged grand larceny.

The defendant, the appellant here, upon oath, pleaded in abatement that the Clay Circuit Court had no lawful jurisdiction either of the defendant or over the subject-matter of the prosecution, because there had been no indictment returned against him for the offences with which he stood charged, but that he was held for trial on the charges of burglary and grand larceny preferred by affidavit and information only; that before and since the alleged commission of the crimes for which he was held for trial, the Clay Circuit Court had been and was still in session; that after the filing of the affidavit and information against him, the regular grand jury of Clay county had met and continued in session about one week, and had adjourned without returning an indictment against him for the crimes charged by the affidavit and information; that he, the defendant, was taken into custody after the commencement of the term of the Clay Circuit Court then in session, and during which said regular grand jury convened, and continued in session as herein above stated. Wherefore the defendant demanded that the prosecution should abate.

The circuit court sustained a demurrer to the plea in abatement, and a jury found the defendant guilty of burglary as charged, fixing his punishment at confinement in the State's prison for four years and disfranchisement for a definite period of time. Over a motion for a new trial challenging the sufficiency of the evidence, judgment followed upon the verdict.

The first objection urged to the proceedings below is that the provisions of section 1679, *supra*, are not sufficiently indicated by the title of the act of which it forms a part.

This section is the same, and is more properly known as section 106 of the act of April 14th, 1881 (Acts 1881, p. 134), entitled "An act concerning proceedings in criminal cases,"

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and certainly has reference to the kind of proceedings referred to in the title.

The next objection made is that the section in question constitutes special legislation in derogation of sections 22 and 23 of article 4 of the Constitution of the State. But the provisions of the section have a uniform operation throughout the State, and apply to all alike under similar circumstances. Legislative enactments, thus operating and applying, can not be rightfully classified as special legislation. *Heanley v. State*, 74 Ind. 99.

Section 17 of article 7 of the Constitution of the State provides that "The General Assembly may modify or abolish the grand jury system."

That provision confers upon the Legislature a large discretion as to the manner in which criminal offences shall be prosecuted.

The plea in abatement presented only the question whether when proceedings are properly commenced against a supposed offender by affidavit and information filed in the circuit or criminal court, the subsequent meeting of the grand jury of the county deprives the court of its jurisdiction to proceed upon the affidavit and information.

The first substantive division of section 1679, referred to in argument as above, declares that "All public offences, except treason and murder, may be prosecuted in the circuit and criminal courts by information based upon affidavit in the following cases:

"*First.* Whenever any person is in custody, or on bail, on a charge of felony or misdemeanor, except treason and murder, and the court is in session, and the grand jury is not in session or has been discharged."

It is a well recognized principle, pertaining to the jurisdiction of courts, that when a court once acquires jurisdiction of a cause it is entitled to retain its jurisdiction until the cause is disposed of, despite any new proceeding which may

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be thereafter commenced in the same or any other court, covering the same subject-matter. The grand jury not being in session when the affidavit and information in this case were filed, the court below immediately acquired jurisdiction of the charges made by them against the appellant, and became entitled to proceed to trial upon them, regardless of any subsequent or intervening meeting of the grand jury of the county.

It is claimed that there was no evidence tending to establish any of the facts necessary to confer jurisdiction by affidavit and information, and that for that reason the verdict was not sustained by sufficient evidence.

Section 1733, R. S. 1881, provides that in prosecutions for a felony by information, it shall not be necessary to prove the facts showing the right of the State to prosecute in that way, unless such facts are put in issue by a verified plea in abatement.

As a careful re-reading of the plea in abatement filed in this cause will readily disclose, it did not put in issue any jurisdictional fact. There was consequently no necessity of making proof of any merely jurisdictional fact at the trial of the cause. *Hodge v. State*, 85 Ind. 561; *Powers v. State*, 87 Ind. 97.

We need not therefore inquire whether there was any evidence tending to prove the facts which conferred jurisdiction to proceed by affidavit and information. These facts, not being put in issue by the plea in abatement, were, as a legal inference, admitted.

For the reasons given, the circuit court did not err either in sustaining the demurrer to the plea in abatement, or in overruling the motion for a new trial.

The judgment is affirmed, with costs.

Filed June 17, 1884.

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No. 11,129.

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| 96 | 166 |
| 134 | 110 |
| 98 | 166 |
| 141 | 22 |
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| 1169 | 120 |

HABEAS CORPUS.—*Return.*—*Practice.*—*Harmless Error.*—Objection to the sufficiency of a return to a writ of *habeas corpus* should be taken by exceptions, and not by demurrer; but if the return be insufficient, and so held upon demurrer, the irregularity in practice is harmless.

CRIMINAL LAW.—*Justice of the Peace.*—*Practice.*—*Appeal.*—A justice of the peace can not render judgment against the accused in a criminal case in his absence, if imprisonment may, by law, be a part of the penalty for the offence, but he may receive the verdict of a jury, and bring the defendant in by warrant to receive judgment; and delay in so doing will not vitiate the judgment. In such case an appeal before judgment is a nullity.

SAME.—*Several Defendants.*—*Judgment.*—*Statute Construed.*—In a criminal prosecution against two defendants jointly, the judgment against those found guilty should be several, and not joint; and if one be absent on the return of a verdict, the rendition of judgment against one does not prevent a judgment against the other when brought in, and from that judgment he may appeal, under R. S. 1881, section 1643, within ten days thereafter.

MITTIMUS.—*Constable.*—*Statute Construed.*—A special constable may take a prisoner committed to jail, to the prison, though his name be not mentioned in the mittimus, notwithstanding section 1433, R. S. 1881.

SAME.—*Misnomer.*—*Habeas Corpus.*—The misnomer of a prisoner in a *mittimus* affords no reason for his discharge on *habeas corpus*.

From the Warren Circuit Court.

J. G. Pearson, for appellant.

J. McCabe and *E. F. McCabe*, for appellee.

HAMMOND, J.—Complaint by the appellee against the appellant for a writ of *habeas corpus*, as follows, omitting the title:

“Jacob Gray complains of Scott Sturgeon, and says, on his oath, that said Scott Sturgeon illegally restrains him of his liberty in the town of Williamsport, in said county; that the cause, or pretence thereof, is a *mittimus* issued by one Ab. V. Holmes, an acting justice of the peace of Washington township, in said county, directed to the jailer of said county, com-

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manding him to confine the plaintiff in the county jail of said county for failure to pay or replevy a pretended judgment of said justice, rendered against said plaintiff for a fine and costs amounting to \$64.65; that said Sturgeon claims to be acting as special constable, but is not named in said paper as such, or in any other manner, nor is he a constable or a marshal; that said pretended judgment was rendered on the 20th day of June, 1883, upon a verdict returned by a jury on a trial had before said justice on a pretended charge of malicious trespass, preferred by Robert C. Anderson in an affidavit charging said crime against Jacob Gray and two others; that said trial was had and verdict [rendered] on — day of May, 1883; that said verdict found the said Jacob Gray and one Thomas Gray, another of the defendants charged in said affidavit, guilty, and assessed their fine at the sum of \$10 each; that no judgment was rendered or pronounced against the said Jacob Gray by said justice, but judgment, as affiant is informed, was pronounced against said Thomas Gray on said verdict; that they took an appeal to the circuit court and entered into recognizance for their appearance in said circuit court to answer said charge in said affidavit, which was accepted by said justice and filed in the clerk's office with all the papers in said cause; that afterwards, to wit, on the 20th day of June, 1883, said justice issued a warrant and caused said Jacob, plaintiff herein, to be brought before him, and then, for the first time, pronounced judgment against this plaintiff, upon said verdict, without having the said Thomas in said court, for all the costs and \$10 fine, and entered up the judgment upon his record, that the illegality of said restraint consists in the fact that the said justice had no jurisdiction to pronounce judgment against the plaintiff after accepting his recognizance, or to cause his arrest, or to take any steps in the case after taking such recognizance; that the said paper, called a *mittimus*, confers no authority on said Sturgeon; that said justice could not render judgment on the verdict as-

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sessing separate fines against the defendants, because said verdict was void. Wherefore he asks that the said restraint may be inquired into, and that he be discharged."

The complaint was subscribed and sworn to by the appellee in proper form. A writ of *habeas corpus* issued by direction of the court, to which the appellant made return as follows, omitting the title of the action:

"The defendant, for a return to the writ herein and for answer, says, that heretofore, to wit, on the —day of ———, 1883, the plaintiff and others were arrested on a warrant issued by Henry Ritenour, an acting justice of the peace, in and for Washington township, in said county, on a charge of having committed a malicious trespass, at said county, on or about the 25th day of March, 1883; that said plaintiff and his co-defendants in said prosecution demanded a jury trial; that said jury, deliberating a reasonable length of time, reported to the said justice that they were unable to agree upon a verdict, and thereupon were discharged; that said defendants Jacob Gray and Thomas Gray took a change of venue from said justice, and said cause was certified to Ab. V. Holmes, an acting and qualified justice of said township; that on the 14th day of May, 1883, plaintiff herein and said Thomas Gray appeared before said justice for trial on said charge, and said cause was submitted to a jury; that said jury returned a verdict of guilty, assessing a fine of \$10 against each of the defendants, Jacob and Thomas Gray; that said plaintiff was voluntarily absent from the court room when said verdict was returned, having, without leave, gone to his home fourteen miles away, and, although three times duly called, failed to appear in said court; that upon the return of said verdict no judgment thereon was rendered of record, and during the absence of said plaintiff the defendants' attorney in said prosecution prayed an appeal to the Warren Circuit Court, and said defendants entered into a recognizance; that the plaintiff herein was not present, and did not sign said recognizance, but his name was signed thereto by Thomas Gray; that said appeal

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was dismissed, and the papers certified back to said justice; and that afterwards said justice issued his warrant for the arrest of said plaintiff, and placed the same in the hands of John R. Hunter, a special constable, who arrested said plaintiff and brought him before said justice on the 20th day of June, 1883, when said justice, in the presence of said plaintiff, pronounced and rendered of record a judgment in due form against said plaintiff on the verdict of said jury; that said plaintiff then and there failing to pay or replevy said judgment, said justice issued a *mittimus* to the jailer of Warren county, and placed the same in the hands of this defendant, a special constable, appointed by said justice to convey said plaintiff to the jailer of said county; that by virtue of said *mittimus*, a copy of which is hereinafter filed and made a part of this return, and said appointment, and the facts herein set forth, this defendant restrains said plaintiff, as he well may do, and has him now in said court."

The return was subscribed and sworn to by the appellant.

A copy of the *mittimus* referred to was filed with the return as follows:

"STATE OF INDIANA, WARREN COUNTY, ss:

"The State of Indiana, to the jailer of Warren county: Whereas, *Jake Gray* has been arrested and tried before me and adjudged guilty of having committed a malicious trespass at said county, and fined in the sum of \$10, and costs taxed at \$54.65, making in all the sum of \$64.65, for which judgment was rendered, and having failed to pay or replevy said judgment, you are, therefore, commanded to confine him in the county jail until discharged by law. Dated this 20th day of June, 1883.

(Signed) "AB. V. HOLMES, J. P."

The appellee, designating the return as an answer, demurred to it, on the ground that it did not state facts sufficient to constitute a defence to his complaint. The court sustained the demurrer; appellant excepted; the court then made an order discharging the appellee from custody. Errors are

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assigned for sustaining the demurrer to the return, and for discharging the appellee.

The correct method of testing the sufficiency of a return to a writ of *habeas corpus* is by exceptions, not by demurrer. Section 1117, R. S. 1881; *Cunningham v. Thomas*, 25 Ind. 171; *McGlennan v. Margowski*, 90 Ind. 150. If, however, the return was insufficient to show that the appellant legally restrained the appellee of his liberty, the error of sustaining the demurrer might be regarded as harmless, and the judgment would not be reversed merely for the irregularity of the procedure. *McGrew v. McCarty*, 78 Ind. 496. It is plain, then, that there is but one question in the case, namely, Does the appellant's return to the writ of *habeas corpus* show that he had legal custody of the appellee?

Before the present code, the law prescribing the powers and duties of justices of the peace in State prosecutions was embraced in an act by itself. 2 R. S. 1876, p. 668. But in "An act concerning proceedings in criminal cases," approved April 19th, 1881, the law governing such proceedings before justices of the peace and in the circuit and criminal courts is brought together in one enactment. Acts 1881, p. 114; sections 1573-1901, R. S. 1881. It will be observed, in reading this act, that some of its provisions relate solely to proceedings in criminal cases before justices of the peace; others, to such proceedings in the circuit and criminal courts; while others apply to all the courts, including those of justices of the peace. This statement is made, as our statutory references as to procedure in criminal cases will be to those provisions relating, either in a special or general way, to justices' courts.

The facts stated in the complaint and in the return to the writ show that the offence with which the appellant was charged before the justice was within the justice's jurisdiction. There is no attempt made in the appellee's complaint to show that there was any irregularity in the proceedings prior to the return of the verdict. The designation in the

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complaint of some of the proceedings as "pretended" and "void" is a conclusion rather than the statement of a fact, and adds no force to the pleading. A mere irregularity would not, of course, render the proceedings void; but as we understand the position of appellee's counsel, it is that the judgment of conviction was void: First, because of the delay of the justice, from May 14th, 1883, when the verdict was returned, to the 20th of the following month, in pronouncing and rendering judgment upon the verdict; and secondly, because, as is claimed, the justice, after granting the appellee an appeal to the circuit court on the verdict of the jury, lost jurisdiction of the case, and could not afterwards render judgment upon the verdict.

Section 1489, R. S. 1881, limiting and fixing the time in certain cases in which justices shall render judgment, applies only to civil actions. In the recent case of *Martin v. Pifer*, *post*, p. 245, we had occasion, in construing this section, to hold that where, by the statute, a judgment was required to be rendered immediately upon the return of the verdict, a delay of six days in entering and signing it did not make it void. There is no statute fixing the time in which, after finding or verdict, judgments shall be rendered by justices in criminal cases. It was held in *Wright v. Fansler*, 90 Ind. 492, that a judgment was valid which was not entered by the justice for nearly two years after the preliminary examination and acquittal of one charged with larceny. It was said in that case: "The reasons which require the recording and signing of a judgment in ordinary civil actions do not apply to criminal prosecutions, and the statute" (section 1489, *supra*) "in terms applies only to civil proceedings. Independently of statute a justice may, at any time, enter his judgment of record."

The reasoning of the court in that case is quite applicable to the present, though the decision related and was properly limited to a judgment of acquittal.

The offence with which the appellee was charged in the af-

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fidavit before the justice was malicious trespass, under section 1955, R. S. 1881. A part of the punishment for that offence may be imprisonment in the county jail. In such case the accused must be present at the trial. Section 1786, R. S. 1881. But if he is present, at the commencement of the trial, his subsequent voluntary absence does not prevent the case from proceeding as far as the return of the verdict. *McCorkle v. State*, 14 Ind. 39; *State v. Wamire*, 16 Ind. 357. But it seems in all cases, other than those punishable by fine only, the accused must be present at the rendition of the judgment. Section 1851, R. S. 1881. The appellee was present when the trial began, but was voluntarily absent when the verdict was returned. Judgment could not, therefore, at that time, be rendered against him. But this did not prevent the justice from rendering judgment against the appellee's co-defendant, who was also found guilty by the jury, and who was present at the return of the verdict. If both defendants had been present, a separate judgment should have been rendered against each. Several persons may be jointly accused of crime, but, if they are convicted, the judgment should be rendered against them severally, not jointly. *State v. Hopkins*, 7 Blackf. 494; *State v. Kinneman*, 39 Ind. 36.

The rendering of a separate judgment against the defendant who was present could not in any way affect the appellee.

For the purpose of rendering judgment, the appellee's personal attendance before the justice was necessary. To secure his presence for the purpose of rendering judgment, it was the duty of the justice to issue a warrant for his arrest. Section 1853, R. S. 1881. In the interest of the proper enforcement of the law, the justice undoubtedly should not have delayed the performance of this duty from May 14th until the 20th of the next month. But we can not see how the appellee may complain of the delay. The complaint does not disclose, nor are we able to understand, how he was harmed by the judgment not having been rendered sooner. We may

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presume it would have been rendered sooner had he appeared before the justice and made a request to that effect.

The delay in rendering judgment did not affect the appellee's right of appeal. He had this right for ten days after the rendition of the judgment, on June 20th.

As to an appeal from a justice's judgment in a criminal case, the statute provides: "Any prisoner against whom any punishment is adjudged may appeal to the criminal court, and, if there be none, then to the circuit court of the county, within ten days after trial, on entering into recognizance for his appearance at the next term of such court, as in other cases; and such appeal shall stay all proceedings." Section 1643, R. S. 1881. The word "trial," as used in the above section, must be held to include all the steps taken in the cause, from its submission to the jury to the rendition of the judgment. *Jenks v. State*, 39 Ind. 1; *Pitzer v. Indianapolis, etc.*, *R. W. Co.*, 80 Ind. 569; *Bruce v. State*, 87 Ind. 450.

It is manifest from section 1643, *supra*, that no appeal lies from a case tried before a justice until after judgment. The appeal taken by, or in behalf of, the appellee after verdict and before judgment, was a nullity. It did not transfer the case as to the appellee to the circuit court. That court properly dismissed the appeal as to the appellee. The justice's granting the appeal and approving the recognizance as to the appellee could not in any way prejudice the right of the State to have the case proceed to judgment.

It was competent for the justice of the peace to appoint a special constable to deliver the appellee, with the *mittimus*, to the county jailer. Sections 1439 and 1633, R. S. 1881. The first of the above sections provides that where a special constable is appointed, process shall be directed to him by his name. But this refers to process usually directed to a constable, commanding him to perform some act therein named. But a *mittimus* is addressed to the jailer. It is a command to the jailer to receive and safely keep a person, charged with or convicted of an offence therein named, until discharged as

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provided by law. It is the duty of the justice to commit to jail every defendant, adjudged to pay a fine and costs, who does not immediately pay or replevy the same. Section 1647, R. S. 1881.

The omission to give the appellee's christian name correctly in the *mittimus* was harmless. It could have been corrected upon motion before the justice, but furnished no ground for the appellee's discharge. The complaint, as well as the return to the writ, shows that the appellee was the person designated in the *mittimus* as the one to be committed. This was sufficient. The identity of his person was important. The correctness of his name was important only so far as it became essential to secure his commitment.

The appellant's return to the writ showed that the appellee was in custody upon process issued upon a final judgment by a court of competent jurisdiction, and that the term of his commitment had not expired. In such case the statute expressly provides that no court or judge in a proceeding of *habeas corpus* shall inquire into the legality of the judgment, or discharge the prisoner. Section 1119, R. S. 1881.

Our conclusion is that the appellant's return to the writ was sufficient, and that there was error in sustaining the demurrer to it.

Reversed, at appellee's costs, with instructions to overrule the demurrer to the return, and for further proceedings.

Filed May 27, 1884.

 No. 10,581.

ROBBINS ET UX. v. MAGEE ET AL.

SUPREME COURT.—*Assignment of Errors.*—That the finding is contrary to law, not sustained by sufficient evidence, or contrary to the law and the evidence, will not, as assignments of error, present any question in the Supreme Court.

SAME.—A joint assignment of errors by several appellants will not present to the Supreme Court a question made upon a ruling against only one of them.

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| 185 | 356 |
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Robbins *et ur.* v. Magee *et al.*

SAME.—Briefs.—As to what constitutes such a brief as is required by the rules of the Supreme Court in order to present a question, see opinion.

REHEARING.—A rehearing will not be granted to enable the appellant so to amend his assignment of errors as properly to present the questions in the record.

From the Rush Circuit Court.

J. Q. Thomas, J. J. Spann and W. A. Moore, for appellants.

J. S. Scobey, W. A. Cullen, B. L. Smith, J. D. Miller, F. E. Gavin, C. Ewing and J. K. Ewing, for appellees.

FRANKLIN, C.—This case has heretofore been before this court. *Robbins v. Magee*, 76 Ind. 381. The judgment was then reversed for the erroneous overruling of demurrers to certain answers. The opinion states the substance of the pleadings, which will give some idea of the facts in the case.

On the return of the case to the court below, the answers were amended to obviate the objections ruled upon by this court. Issues were formed, and there was a trial by the court, finding for the defendants, and a judgment for costs was rendered upon the finding.

The plaintiffs again appealed to this court, and have assigned eight specifications of error.

The first three are that the finding is contrary to law, not sustained by sufficient evidence, and is contrary to the law and the evidence.

These are not proper specifications of error. The only way to make these questions available in this court is to embrace them as reasons in a motion for a new trial, and assign error upon the overruling of the motion. If there was any such motion made in this case, there has been no error assigned upon the overruling of it. Hence these questions are not before us in a way to be considered.

The fourth specification of error is, "Because the court overruled the demurrer of the plaintiff Jacob F. Robbins to the second paragraph of the defendant Styers' answer." There are two appellants, and the assignment of error is treated by the parties as being jointly made by both of them. There-

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fore, a specification of error upon a ruling made against only one of them is not good. A joint assignment of errors is like a joint complaint or demurrer, if not good as to all, it is not good as to any. *Estep v. Burke*, 19 Ind. 87; *Teter v. Hinders*, 19 Ind. 93; *Towell v. Hohlweg*, 81 Ind. 154; *Williams v. Riley*, 88 Ind. 290; *Walls v. Baird*, 91 Ind. 429.

The fifth specification is in sustaining the demurrer to the second paragraph of the reply. It is not referred to or discussed as being complained of in appellants' brief; it is therefore regarded as waived.

The sixth specification is on overruling the demurrer to the cross complaint of Styers.

The seventh is for overruling the demurrer to the third and fourth paragraphs of Magee's answer.

The eighth is for overruling the demurrer to the creditors' answer.

After stating the facts and the pleadings, with the rulings thereon, in appellants' brief, all that they further say therein about these specifications of error is as follows: "We say that all these matters are errors; and that the court erred in overruling the demurrer to the answer of the creditors, as set forth above, and also that the court erred in overruling the demurrer to the second, third and fourth paragraphs of the answer of Magee; and the court erred in refusing to strike out the first paragraph of the answer of Styers; that the court erred in overruling the demurrer to the same, and also by overruling a demurrer to the cross complaint of Styers, as noticed above; that the evidence is not sufficient," etc. They then refer to the evidence in a like general way, and close their brief.

Since this opinion was prepared appellants have filed a supplemental brief fully discussing the evidence. But as there is no assignment of error upon overruling a motion for a new trial, no question upon the evidence is presented for consideration.

It is insisted by appellees that appellants' brief is insuffi-

cient to require the court to investigate and decide the questions properly specified in the assignment of errors.

A mere repetition of the specifications in the assignment of errors is not a sufficient brief. To simply say that the court erred, without showing wherein the error consisted, is the statement of a mere conclusion, without furnishing the facts or authority upon which it is based, and is insufficient as a brief in the case.

In a brief the points relied upon should be stated with perspicuity, and argued in a clear and concise manner, and the authorities, if any, cited. *Parker v. Hastings*, 12 Ind. 654; *Bennett v. State, ex rel.*, 22 Ind. 147; *Deford v. Urbain*, 42 Ind. 476; *Gardner v. Stover*, 43 Ind. 356; *Roy v. State*, 58 Ind. 378; *McCann v. Rodifer*, 90 Ind. 602.

In the case of *Millikan v. State*, 70 Ind. 283, it is said that "a general statement of the objections to those proceedings which are relied on for a reversal of the judgment, without any argument or the assignment of any specific reasons, in support of the objections thus indicated. Such a paper is not a brief within the spirit and meaning of rule 14 of this court and presents no question for our decision in this court."

In the case of *Harrison v. Hedges*, 60 Ind. 266, it is said: "'Life is too short,' and the docket of this court is entirely too much crowded, for parties and their counsel to expect or require us to devote our time to searching for errors which they ought, under the long established rule of this court, to refer specifically to, in their briefs."

In the case under consideration, no specific objection is pointed out to the rulings of the court upon the pleadings referred to, and no reason is given whatever to show why the rulings complained of should be held erroneous. Although the page and line in the record of the rulings are referred to, the court needs to be informed why the rulings are objected to, by giving the reasons, if any exist, why the rulings should

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be held erroneous. And as this has not been done in this case, this court will not search for reasons upon which to reverse the judgment.

We think that this attempted brief, as to these specifications of error, is not a substantial compliance with rule 14 of this court, and is not sufficient to require any decision by this court upon the objections to these rulings upon the pleadings.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 29, 1884.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—The rehearing is asked for the purpose of enabling appellant to amend his assignment of errors.

There is nothing in the assignment of errors in relation to a motion for a new trial, and no question based upon the sufficiency of the evidence could be considered. Appellant earnestly insists that he ought to have a rehearing and be permitted to assign as error the overruling of the motion for a new trial, so that the merits of the case upon the evidence could be passed upon, and in support thereof we have been referred to the case of *Yater v. Mullen*, 24 Ind. 277, as a case wherein a rehearing was granted to enable the petitioner to amend the record.

In this reference appellant is certainly mistaken; the petition for a rehearing in that case was overruled instead of being granted, and in overruling it a certain statement in the original opinion was corrected.

The record in this case was filed in this court December 14th, 1882. The cause was submitted May 29th, 1883. Appellant's brief was filed February 18th, 1884. Appellant's additional brief, by additional counsel, upon the weight of the evidence, was filed March 22d, 1884.

The Standard Oil Company v. Combs, Treasurer.

Ample time had elapsed before the decision of the case on the 29th day of March, 1884, for any desired amendment of the assignment of errors, or by *certiorari* of any other part of the record. And when appellant filed his elaborate brief upon the evidence without any notice of desiring to make an application to amend the assignment of errors, nothing appeared in the record requiring further delay in the decision of the case. And the rule is well settled that a rehearing will not be granted to enable a party to amend the record. *State, ex rel., v. Terre Haute, etc., R. R. Co.*, 64 Ind. 297; *Warner v. Campbell*, 39 Ind. 409; *Cole v. Allen*, 51 Ind. 122; *Merrifield v. Weston*, 68 Ind. 70.

PER CURIAM.—The petition for a rehearing is overruled.
Filed May 29, 1884.

No. 11,309.

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| 140 | 319 |

THE STANDARD OIL COMPANY v. COMBS, TREASURER.

TAXES.—*Situs of Chattels.*—*Ownership by Non-Resident.*—Staves purchased by a citizen of another State, remaining in this State to receive a finishing process before shipment to another State, are taxable in this State.

SAME.—*Constitutional Law.*—Such taxation is not a regulation of commerce, nor is it a tax on exports, within the meaning of the National Constitution.

From the Perry Circuit Court.

R. S. Taylor and *H. J. May*, for appellant.

C. H. Mason, for appellee.

ELLIOTT, C. J.—On the 20th day of March, 1880, the appellant contracted with J. A. McGregor for the purchase of 3,000,000 staves, and on the 20th day of September following for 1,000,000 more. The contracts, as originally written, provided that McGregor should manufacture the staves and deliver them at the landing in Pittsburgh, Pennsylvania, where they were to be inspected and paid for, but a modification of the contracts was subsequently made, by which it was

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agreed that McGregor should deliver to the appellant, at its stave yards in Perry county, Indiana, the staves contracted for, where they were to receive a finishing process called "bucking," and when "bucked" they were to be shipped to the appellant at Pittsburgh. The original contracts provided that on inspection at Pittsburgh the staves should be paid for at the rate of \$26 per 1,000, and the contracts as modified provided that when the staves were cut and piled up the appellant should advance on the purchase price \$12 per thousand for the staves in the rough, and \$4 more when they were "bucked." The term "bucking" signifies that part of the process of manufacture in which the rough staves are put through a machine called a "bucker," and by which they are cut to a uniform thickness, the surface partially smoothed and a slight convexity of form produced. Under these contracts the staves were in the appellant's yards in Perry county on the 1st day of April, 1881, and taxes were assessed upon them.

The appellant's counsel thus state the question presented by the record: "Were the staves, of which the appellant had thus become the owner, and which happened to be in Perry county on the 1st day of April, 1881, subject to taxation in that county under the laws of Indiana?"

Property in the course of transit through this State, and here only for the purpose of transportation, is not subject to taxation. *Standard Oil Co. v. Bachelor*, 89 Ind. 1; *State v. Carrigan*, 39 N. J. L. 35. If, however, the property is here for a different purpose, it may be subject to taxation by our laws, although its owner may reside in another State. There is a difference between property of a tangible nature and choses in action, for property of the former character is liable to assessment wherever it has a *situs*; while taxes on choses in action are, as a general rule, leviable against the owner under the laws of the State of his domicile. *Herron v. Keeran*, 59 Ind. 472; S. C., 26 Am. R. 87; *Burroughs Tax*, section 40; *Cooley Tax*. 14; *Dyer v. Osborne*, 11 R. I. 321.

The property of the appellant was of a tangible nature, and

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was in this State for the purpose of undergoing, while here, a partial finishing process, and it can not be regarded as having been in the course of transit, nor as here for a mere temporary purpose. Property within the State for the purpose of undergoing any part of the process of manufacture is here for more than a temporary purpose connected with its transportation. The *situs* of the property does not depend upon the extent of the work that is to be done upon it, for, if it is here to be put through any of the stages in the process of manufacture, it is here for a purpose which legitimately subjects it to taxation. It can not be justly asserted that property within the State for the purpose of undergoing a part of the process of manufacture is here for a mere temporary purpose, or for the purpose of transportation. The conclusion we have stated seems clear upon principle, but authorities are not wanting. In *Rieman v. Shepard*, 27 Ind. 288, the court said: "In the case under consideration, the property was not in transit through the county of Vigo. It was brought there, not for immediate re-shipment, but that money, labor and skill might be there expended upon it, to enhance its value and change its condition as a merchantable commodity. While there, and undergoing this change in its condition, it, as property, had a *situs* within the State and was under the protection of its laws."

The case of *Powell v. City of Madison*, 21 Ind. 335, holds, as does the preceding case, that property while within this State for the purpose of undergoing a process to prepare it for market in an improved or changed form, is subject to taxation. Speaking of goods *in transitu*, the Supreme Court of Illinois says: "Goods or property are, technically, *in transitu* when they are passing from one place to another, which was not the case with this grain. It had not commenced its transit from one place to another;" and it was held that grain bought by an agent on commission was subject to taxation. *Walton v. Westwood*, 73 Ill. 125. In the case of *Ogilvie v. Crawford County*, 7 Fed. R. 745, the court held, as we did in *Standard*

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Oil Co. v. Bachelor, supra, that property ready for transportation should be regarded as *in transitu*, and exempt from taxation, but said: "There must be in my judgment a purpose to ship immediately, or at least as soon as transportation can be conveniently obtained, followed by actual shipment in a reasonable time, in order to exempt the property from taxation."

The Supreme Court of California, in *People v. Niles*, 35 Cal. 282, said that cattle brought into a county for pasturage were not there transiently, but were there for such a purpose as subjected them to taxation. A similar doctrine was declared in *Hardesty v. Fleming*, 57 Texas, 395.

There is, as is obvious from what we have said, a radical difference between this case and the case of *Standard Oil Co. v. Bachelor, supra*, for, in that case, nothing was to be done to the property in this State, it was ready for shipment and the owner intended to ship it as soon as means of transportation could be procured; while in the present case the property was not ready for shipment, nor was it intended to be shipped until subjected to a process changing its form and enhancing its value. The question of intent is a material one, for great abuse would grow up if property might be accumulated without the intention to ship at once, or as soon as, by reasonable diligence, means of transportation could be obtained. The materiality of the intention to ship was noted in *Ogilvie v. Crawford County, supra*, where it was said: "This allegation of intention is essential, because otherwise a purchaser might crib his corn on a railway with no purpose of immediate shipment, but for the purpose of awaiting the future course of the markets, or with intent to evade taxation; in which cases the transit would, in my opinion, be treated as at an end, for the time being at least." The intention of the buyer in this case was to keep the property within this State for a definite purpose, and not to ship it until that purpose had been accomplished. While it was here awaiting the execution of that purpose, it was within the protection of our laws, and must

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bear its share of the public burdens. Judge Story says: "A nation within whose territory any personal property is actually situate, has as entire dominion over it while therein, in point of sovereignty and jurisdiction, as it has over immovable property situate there." Story Conflict of Laws, section 550. The authorities sustain this doctrine. *Ames Iron Works v. Warren*, 76 Ind. 512; S. C., 40 Am. R. 258; *Green v. Van-Buskirk*, 7 Wall. 139; *Clark v. Tarbell*, 58 N. H. 88.

Property in this State for the purpose of being subjected to a process essential to its fitness for sale or use is situated here, no matter what may be its ultimate destination. All property in a mill or factory owned by non-residents is situated here while work or skill is being expended upon it, although the purpose for which it was bought was to prepare it for foreign markets. Cotton or wool in a New England mill or factory for the purpose of being manufactured into fabrics is situated there, wherever its owner may reside, or whatever he may intend to do with it after the manufacturing process is completed, and what is true in such a case is equally so in the present.

A statute subjecting to taxation property bought in this State, and kept here for the purpose of undergoing a partial process of manufacture, is not in conflict with that provision of the National Constitution which provides that Congress shall have power "To regulate commerce with foreign nations, and among the several States." Constitution U. S., article 1, section 8. There is, in such a case, no interference with inter-state commerce; the State does no more than exercise an attribute of sovereignty over personal property within its dominion, and does not usurp any power belonging to Congress. If it be true that a State can not tax property in such a case, then wheat sent here to be manufactured into flour in our mills can not be taxed, although it is situate within our territory and is within the protection of our laws. This position of counsel is not supported by principle, nor is it in harmony with the adjudged cases. Judge Cooley says:

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"But a tax on property that may be the subject of commerce under congressional legislation, is not a tax on commerce. Neither is a tax on property that has been the subject of such commerce, where it is taxed only as property, and in common with all other property within the State." *Cooley Tax*. 62. Coal was brought from Pennsylvania to Louisiana for sale, taxes were assessed against it in the latter State, and it was held that the statute authorizing the tax did not violate the constitutional provision of which we are speaking. *Brown v. Houston*, 33 La. An. 843; S. C., 39 Am. R. 284.

The statute declares that taxes shall be levied upon property as property, and does not discriminate against any person, or any class of persons, and is valid under the decisions of the Supreme Court of the United States.

The principle established by the decisions of that court is, that the taxing power of the State may be exercised upon property within its territory, although commerce and its instruments may be indirectly affected, but that no discrimination can be made in favor of the citizens of one State in matters affecting inter-state commerce, nor can there be any regulation of commerce. *County of Mobile v. Kimball*, 102 U. S. 691; *Webber v. Virginia*, 103 U. S. 344; *Machine Co. v. Gage*, 100 U. S. 676; *Cook v. Pennsylvania*, 97 U. S. 566; *Waring v. Mayor*, 8 Wall. 101; *Pervear v. Com.* 5 Wall. 475; *License Tax Cases*, 5 Wall. 462; *McGuire v. Com.*, 3 Wall. 387; *Brown v. Maryland*, 12 Wheat. 419. Many acts of legislation indirectly affecting commerce have been upheld, and the general rule is that if the legislation does not assume the form or effect of a regulation of commerce, it will not violate the National Constitution. *Munn v. Illinois*, 94 U. S. 113; *Sherlock v. Alling*, 93 U. S. 99; *State Tax Case*, 15 Wall. 284; *Cooley v. Board, etc.*, 12 How. 299; *Harrigan v. Connecticut River, etc., Co.*, 129 Mass. 580; S. C., 37 Am. R. 387; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12.

The State has power to lay taxes on property bought within its limits, and intended to be ultimately transported to an-

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other State for sale or use. A statute providing for the assessment of taxes in such a case is not in conflict with the provision of the Constitution of the United States which declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws." Article 1, section 10, Constitution of U. S. This provision does not apply to articles brought into one State from another, nor to articles intended to be carried out of one State to another, but applies only to intercourse with foreign nations. *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Machine Co. v. Gage*, *supra*; *Brown v. Houston*, *supra*; *City of New Orleans v. Eclipse, etc., Co.*, 33 La. An. 647; S. C., 39 Am. R. 279; *State v. Pinckney*, 10 Rich. (Law) 474; *Harrison v. Mayor, etc.*, 3 Sm. & M. 581.

Judgment affirmed.

Filed June 17, 1884.

No. 11,330.

HARRISON SCHOOL TOWNSHIP v. MCGREGOR.

PLEADING.—*Complaint.*—*Demurrer.*—*Defective Record.*—Where the ruling of the court upon a demurrer to the complaint is assigned as error, and the record is defective in that the demurrer is not set out therein, the error is not available for the reversal of the judgment, for the reason that the cause of demurrer is not apparent.

SCHOOL TOWNSHIP.—*Corporation.*—*May Sue and be Sued.*—Under section 4437, R. S. 1881, each civil township, in any county in this State, is declared to be a school township, and, as such, to be a corporation by a certain name and style, "and, by such name, may contract and may be contracted with, sue and be sued, in any court having competent jurisdiction."

LACHES.—*Delay in Bringing Suit.*—*Limitation.*—*Written Contract.*—*Complaint.*—Mere delay in bringing suit upon a written contract does not constitute such laches on the part of the plaintiff as will render his complaint bad on a demurrer thereto for the want of sufficient facts, and especially so, where the action is brought within the period prescribed by the statute of limitations.

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CIVIL ACTION.—*Adequate Legal Remedy.*—*Controverted Claim.*—*Mandate.*—

Where the ordinary civil action will afford the plaintiff an adequate legal remedy, and, especially, where the validity of his claim is controverted, he can not resort, in the first instance at least, to the extraordinary proceeding by mandate.

SCHOOL CORPORATION.—*Teacher's Salary.*—*Want of Funds.*—*No Defence.*—

In an action by a teacher against a school corporation to recover his salary or compensation for teaching school, the fact that the corporation has no funds on hand wherewith to pay the plaintiff's claim is no defence to his action.

SUPREME COURT.—*Harmless Error.*—A judgment will not be reversed by the Supreme Court for an error in sustaining a demurrer to a paragraph of answer, when it appears that all competent evidence, under such paragraph, was admissible under another paragraph of answer, upon which issue was joined.

SAME.—*Newly Discovered Evidence.*—*New Trial.*—*Affidavit.*—*Bill of Exceptions.*

—Where newly discovered evidence is assigned as cause for a new trial, it must be sustained by affidavits, showing its truth; and, unless these affidavits are made part of the record by a bill of exceptions or an order of court, they can not be considered by the Supreme Court in determining whether or not the newly discovered evidence is a sufficient cause for granting a new trial.

From the Clay Circuit Court.

E. S. Holliday and *G. A. Byrd*, for appellant.

S. M. McGregor, *I. N. Compton*, *G. A. Knight* and *C. H. Knight*, for appellee.

Howk, J.—In this case the appellee, McGregor, sued the appellant in a complaint of five paragraphs. Each paragraph counted upon a separate written agreement by and between the appellant's trustee and the appellee. The five agreements were of different dates, but in each of them the appellee, a licensed school teacher, undertook and agreed to teach a certain school, in Harrison school township, during a certain term of time and for a certain compensation, which compensation the appellant's trustee thereby undertook and agreed to pay the appellee, at the close of such term. In each paragraph of his complaint the appellee alleged that he had fully performed his part of the agreement therein declared upon; that the appellant had wholly failed to comply with

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and perform its part of such agreement, in this, that it had wholly failed to pay him the compensation which it had therein agreed to pay him for his services in teaching such school, or any part thereof, although the funds for such payment had come into its hands from the common school fund of this State, and although often requested to pay, had hitherto wholly failed to pay the appellee, and that such compensation was then due the appellee, and wholly unpaid. Wherefore, etc. The cause was put at issue and tried by a jury, and a verdict was returned for the appellee, assessing his damages in the sum of \$697.75, and, over the appellant's motion for a new trial, judgment was rendered on the verdict.

In this court the appellant has assigned as error the overruling of its demurrer to the appellee's complaint. This demurrer is not set out in the record of this cause. In section 339, R. S. 1881, it is provided that the defendant may demur to the complaint for either one of six specified causes, and that for no other cause shall a demurrer be sustained. It is apparent, therefore, that no available error can be predicated by the appellant in this case upon the overruling of its demurrer to appellee's complaint. *Rout v. Woods*, 67 Ind. 319; *Hammon v. Sexton*, 69 Ind. 37; *McGinnis v. Gabe*, 78 Ind. 457.

But the appellant has also assigned here as error that the appellee's complaint does not state facts sufficient to constitute a cause of action. This assignment of error calls in question the sufficiency of the complaint as an entirety, after verdict and judgment thereon, for the first time in this court. The complaint was certainly sufficient, if the several agreements therein declared upon were valid contracts and binding upon the appellant. It is claimed, on behalf of the appellant, that the complaint is bad, because "a school township can not be sued." This claim is utterly untenable. In section 4437, R. S. 1881, in force since August 6th, 1859, it is provided as follows: "Each and every township that now is, or may hereafter be organized in any county in this State, is hereby also declared to be a school township, and, as such, to be a body

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politic and corporate, by the name and style of '— school,— township of — county,' according to the name of the township and of the county in which the same may be organized; and, by such name, may contract and may be contracted with, *sue and be sued*, in any court having competent jurisdiction."

The power of a school township to sue, and its liability to be sued, have been recognized in many of the cases decided in this court. *Jackson Tp. v. Barnes*, 55 Ind. 136; *Wright v. Stockman*, 59 Ind. 65; *Utica Tp. v. Miller*, 62 Ind. 230; *Hornby v. State, ex rel.*, 69 Ind. 102.

Again, it is urged by the appellant's counsel, that the complaint is insufficient, "because appellee's laches, in not suing long before he did, have precluded his right to recover." This objection to appellee's complaint does not seem to us to be well taken. If the averments of the complaint show laches on the part of any one, it is on the part of the appellant, rather than of the appellee. Our own reports show that the appellee has been reasonably diligent in his efforts to collect the money due him on the written contracts of the appellant now in suit. About seven years ago the appellee obtained a judgment on the same contracts in the court below, which judgment was afterwards reversed by this court, in *Harrison Tp. v. McGregor*, 67 Ind. 380, because the appellee had made the mistake, very common about that time, of bringing his suit against the civil instead of the school township. Aside from this, however, if the allegations of the complaint are true, and, as they are well pleaded, their truth is admitted, the only negligence shown thereby is that of the appellant, in its failure to pay the appellee his money, long since earned and due him under its contracts. The complaint would have been good even upon a demurrer thereto for the want of sufficient facts; and it is good beyond all room for doubt when questioned, as it is, after verdict and judgment, for the first time in this court.

The point is also made, on behalf of the appellant, that the appellee has mistaken his remedy; that if, by reason of the

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facts stated in his complaint, he is entitled to any relief against the appellant, he can obtain such relief only by an application for a mandate against the trustee of the township. This point is not well taken. It is certainly not shown by his complaint that the appellee did not have an adequate legal remedy in the ordinary civil action, and where he has such remedy in such action, it is well settled that he can not resort, in the first instance, at least, to a proceeding by mandate. *Excelsior, etc., Ass'n v. Riddle*, 91 Ind. 84, and cases cited. Especially is this so, where, as in this case, the validity of the plaintiff's claim is in controversy.

The appellant next complains of the alleged error of the trial court in sustaining appellee's demurrer to the second, fifth and sixth paragraphs of its answer. It is shown by the record that on the 17th day of January, 1882, the appellant answered by a general denial and in five special or affirmative paragraphs, and the appellee was ruled to reply. The cause was then continued, and it was afterwards continued from term to term, without any action being had therein, until the January term, 1883, of the court. There is no demurrer to the answer, or to any paragraph thereof, appearing in the record, nor do the order-book entries in the cause show the filing of any such demurrer. In this state of the record it is claimed that "this court can not know what the causes of demurrer were." There is, however, under the code, only one cause of demurrer to an answer or paragraph of answer. Thus, in section 346, R. S. 1881, it is provided as follows: "Where the facts stated in any paragraph of the answer are not sufficient to constitute a cause of defence, the plaintiff may demur to it under the rules prescribed for demurring to a complaint." *Thomas v. Goodwine*, 88 Ind. 458.

The second paragraph of answer was pleaded by the appellant to the first paragraph of appellee's original complaint, which was a common count for work and labor done and performed by him, at appellant's request, in teaching school, etc. *Harrison Tp. v. McGregor, supra*. Afterwards, when the

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appellee filed his amended complaint, which is the only complaint now appearing in the record, he wholly omitted and withdrew therefrom the original first paragraph or common count. The second paragraph of answer ought to have been withdrawn from the record at the same time, for it is wholly inapplicable to the first paragraph of the amended complaint, which counts upon the appellant's written contract. The second paragraph of answer states that the cause of action mentioned in the first paragraph of complaint did not accrue within six years, etc.; and, as applied to the first paragraph of the amended complaint, it was clearly bad. There was no error, therefore, in sustaining appellee's demurrer to this second paragraph of answer.

In the fifth paragraph of its answer the appellant alleged that the several sums of money apportioned, set apart and paid over to its then trustee, for the purposes of tuition, during the years the appellee averred that he taught school for the appellant, was expended and paid out by its then trustee; that no part of the sums of money claimed by the appellee as due him from the appellant was paid over to the successor in office of appellant's said trustee; and that no part of the tuition fund, which came into the hands of appellant's then trustee for the purpose of paying teachers in said township, during the time appellee averred that he taught school therein, was then in the hands of the appellant or its present trustee. "And hence defendant says that plaintiff ought not to recover a judgment against this defendant. Wherefore," etc.

It needs no argument, we think, to show that this paragraph of answer stated no defence to appellee's action. It amounts simply to this, that the appellant had no funds on hand to pay the appellee the money he had earned, and which it had agreed to pay him for his services in teaching school within its territorial limits. A corporation, such as the appellant, can not plead in bar of an action upon its written contract the fact, if it be the fact, that it has no funds on hand wherewith to pay its just indebtedness. Appellee's complaint

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shows that the appellant is indebted to him in a large sum of money, for his services in teaching one of its schools, for which he demanded judgment. In the paragraph of its answer now under consideration, the appellant does not deny its indebtedness to the appellee, but it says that it has no money in its hands applicable to the payment of such indebtedness; and the paragraph concludes with the singular *non sequitur*, "and hence plaintiff ought not to recover a judgment against this defendant." The paragraph of answer was clearly insufficient, and the demurrer thereto was correctly sustained. *Harmony School Tp. v. Moore*, 80 Ind. 276.

In the sixth paragraph of its answer the appellant alleged that, at the time the appellee rendered his services as claimed in his complaint, Robert Dalton, with whom, as trustee, appellee contracted, was the duly elected, qualified and acting trustee of Harrison township, and *ex officio* trustee of Harrison school township, and, as such, had full control of all the educational matters of such school township; that for each of the terms of school so taught by him, the appellee had drawn from the proper legal sources all the funds due such township for tuition purposes; that, for each of the several terms of school the appellee alleged that he taught in such township, the trustee thereof legally and properly expended all the money assigned to such township; that all of such funds were expended for the purposes of tuition; that such trustee, in due form of law, reported his account current to the board of commissioners of Clay county, which report was received, approved and published in conformity to law, and copies thereof duly filed with the county superintendent; that in said several reports appellee's several claims are shown to have been fully paid and satisfied, and said fund exhausted and nothing on hand for the payment of said balances.

And the appellant averred that the appellee was estopped from contracting for any of such funds in advance, and had full knowledge, notice and information of said several reports and the records thereof, and of all the official acts of such

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trustee, and of the full expenditure of all the tuition funds of such township for the several years claimed in such complaint; that if anything was due appellee there were no funds or means of paying the same under the appellant's control; that if appellee had any remedy it was on the official bond of said Dalton, as such trustee, and not against the appellant; and that the appellee was estopped and legally barred of his suit against appellant. Wherefore, etc.

In the first paragraph of its answer, the appellant alleged that before the commencement of this suit it had fully paid the appellee each and all the sums of money sued for, in each and all the several paragraphs of his complaint. In the third paragraph of its answer, the appellant alleged that it paid the appellee the full sum of money demanded in each paragraph of his complaint; that appellee then and there executed to Robert Dalton, its then trustee (whose assistant appellee then was in the discharge of his official duties as such trustee), his receipts in full for said several sums of money, copies of which receipts were filed with and made parts of such paragraph of answer; whereby appellee acknowledged the receipt of all that was due him under the several paragraphs of his complaint; that the appellee then and there consented to, altered and aided appellant's then trustee in the preparation and execution of his official reports to the board of commissioners of Clay county, at and in the board's regular settlements with such trustee; that in said reports of such trustee, officially made under the statute, the said several receipts for the said sums of money, claimed by appellee to then and still be due from the appellant for his services as a teacher, as stated in his complaint, were filed as vouchers and were received and approved by the county board, as receipts in full discharge of appellee's claim as a teacher of the schools of said township; that the board of commissioners then and there, with the appellee's knowledge and consent, fully approved and accepted such reports of said trustee, and the said several receipts for the respective amounts were fully

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credited to said trustee as an expenditure of so much of the tuition funds of said township, all of which was duly advertised in the township, in due form of law, with appellee's knowledge and consent, by all of which the tuition funds were entirely exhausted for those years. Wherefore the appellant said that the appellee was estopped from claiming that any of the said receipts were false and forged, or that he had or has any debt due him from the appellant, under the contracts in suit.

These two affirmative paragraphs of answer, the *first* and *third*, remain in the record, and upon these the appellee joined issue by a reply in general denial. By a second reply to so much of the third paragraph of answer as set up his execution of vouchers, the appellee denied under oath the signature of certain of such vouchers, and said that he never signed, nor authorized any person to sign, his name to said instruments. This second reply was duly verified by the oath of the appellee.

The fourth paragraph of appellant's answer, also remaining in the record, was a general denial of each and every allegation of appellee's complaint.

With this statement of the issues of fact in the cause, we proceed now to the consideration of the alleged error of the court in sustaining appellee's demurrer to the sixth paragraph of answer, of which paragraph we have heretofore given a full summary. We are of opinion that no available error was committed by the court in sustaining the demurrer to this sixth paragraph of answer; for every material fact averred in this paragraph was clearly admissible in evidence under other paragraphs of answer, remaining in the record. In such a case it has often been decided by this court that the error in sustaining the demurrer is harmless, and, for a harmless error, a judgment will not be reversed. *Evansville, etc., R. R. Co. v. Baum*, 26 Ind. 70; *Wolf v. Schofield*, 38 Ind. 175;

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Marks v. Trustees, etc., 56 Ind. 288; *Traylor v. Dykins*, 91 Ind. 229.

Under the alleged error of the court, in overruling its motion for a new trial, it is first claimed on behalf of the appellant, that the verdict of the jury was not sustained by sufficient evidence. In discussing this cause for a new trial the only point made by the appellant's counsel is that the appellee had failed to show by evidence that the funds for the payment of his claim had come into appellant's hands from the common school fund of this State, as he had alleged in his complaint. The allegation in question was an immaterial and unnecessary one, and it was not requisite to appellee's recovery in the action that its truth should be established by evidence. In *Harmony School Tp. v. Moore, supra*, it was held that in an action against a school township to recover for services rendered as a teacher, it is not necessary to allege in the complaint that the trustee has sufficient funds belonging to the school revenue for tuition with which to pay the claim. If the fact need not be alleged, surely it need not be proved.

The only other cause for a new trial, upon which the appellant's counsel seem to rely in argument for the reversal of judgment, is "newly-discovered evidence." This is the seventh statutory cause for a new trial (section 559, R. S. 1881), and it must be sustained by affidavit showing its truth. Section 562, R. S. 1881. The clerk of the court below has copied into the transcript of this cause two affidavits, which seem to have been filed with appellant's motion for a new trial. But these affidavits were not made a part of the record either by a bill of exceptions or by an order of the court; and therefore they can not be considered here in determining the question whether or not the appellant was entitled to a new trial on the ground of newly-discovered evidence. This point is settled by many decisions of this court. *Fryberger v. Perkins*, 66 Ind. 19; *Williams v. Potter*, 72 Ind. 354; *Iles v. Watson*, 76 Ind. 359; *Chambers v. Kyle*, 87 Ind. 83.

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The motion for a new trial was correctly overruled.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment.

The judgment is affirmed, with costs.

Filed June 17, 1884.

No. 10,796.

THE WESTERN UNION TELEGRAPH COMPANY v. REED.

TELEGRAPH.—*Failing to Transmit Message.*—*Penalty.*—*Lex Loci.*—*Statute Construed.*—The statute, R. S. 1881, section 4176, giving a penalty for failure to transmit a telegraphic message, does not apply to messages not sent from this State, and the sender only can recover the penalty.

SAME.—*Special Damages.*—*Complaint After Verdict.*—A complaint to recover special damages for loss caused by the incorrect transmission of a telegram, which avers facts showing that the loss could not have been caused by the error, is bad after verdict.

From the Decatur Circuit Court.

J. E. McDonald, J. M. Butler and A. L. Mason, for appellant.
J. S. Scobey, for appellee.

HAMMOND, J.—The appellee sued the appellant in a complaint of two paragraphs. In the first paragraph the appellee sought to recover the statutory penalty, and also special damages, for the appellant's failure correctly to transmit a telegram. The second paragraph was to recover the statutory penalty for failing to transmit the same message.

The appellant answered specially. The appellee's demurrer to the answer was sustained; the appellant excepted to the ruling, and, declining to answer further, judgment was rendered in favor of the appellee for \$150. The telegraph company excepted to the judgment and appealed to this court.

Errors assigned here are, that neither paragraph of the complaint states facts sufficient to constitute a cause of action, and that the court erred in sustaining the demurrer to the answer and in rendering judgment for the appellee.

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The dispatch in question, as is averred in each paragraph of the complaint, was sent from the appellant's office in Chicago, Illinois, by Millmine, Badman & Co., of that city, to the appellee at Saint Paul, in this State.

The complaint is wholly insufficient to recover the statutory penalty for two reasons:

1. The law of the place from which a message is sent governs its transmission. Statutes prescribing penalties, or conferring rights of action, are limited in their application to the States in which they are enacted. A telegraph company is not subject to the penalty prescribed by our statute for failure to transmit a dispatch, sent from a place without, to a place within, this State. *Carnahan v. Western Union Tel. Co.*, 89 Ind. 526.

2. The appellee did not send the telegram; it was sent to him. The sender alone of a dispatch can maintain an action to recover the statutory penalty. Section 4176, R. S. 1881; *Western Union Tel. Co. v. Pendleton*, 95 Ind. 12.

The want of care, shown in drawing the first paragraph of the complaint with respect to the claim for special damages, was owing to the fact, no doubt, that the appellant's reliance for a recovery was based principally upon the penal provision of the statute. The averments to support the demand for special damages are substantially as follows: The appellee was a general dealer in buying, selling and trading in grain of all kinds at Saint Paul, this State. He had in an elevator in Chicago 10,000 bushels of oats for sale in the care of Millmine, Badman & Co., grain merchants, doing business in that city. On August 12th, 1882, said merchants sent from the appellant's office, in Chicago, to the appellee at Saint Paul, a message informing him that they had sold his oats at thirty-five and *three-fourths* cents per bushel.

The message was changed in transmission by the appellant's negligence, so as to inform the appellee that the sale was for thirty-five and *one-fourth* cents per bushel. The ap-

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pellee did not, as is alleged, countermand the sale, as he would have done had the message been correctly sent and delivered by the appellant, but permitted it to stand, thereby claiming to lose one-half cent on each bushel of oats, making his whole loss \$50. If presumptions were to be indulged outside of the record, it might be supposed that there was a mistake either in the complaint itself or in the copy of it in the record, and that what the appellee did say, or intended to say in his complaint, was that the dispatch, as sent by the Chicago merchants, announced the sale of the oats at thirty-five and *one-fourth* cents per bushel, but that, as received by the appellee, it informed him that the sale was made at thirty-five and *three-fourths* cents per bushel. In such case it can be seen how the loss complained of might have occurred. But we are bound by the complaint, as it comes to us in the record, and, as thus presented, it is apparent that it makes no case for special damages upon the ground stated. It appears from the averments of the complaint, that the charges for transmitting the message were paid by the parties sending it. The appellee's complaint, therefore, is not good even to recover for such charges.

No brief has been furnished us by counsel for the appellee.

It is due to the learned judge who presided at the trial below to say that the record fails to show that his attention was called to the defects in the complaint. Although in such case the trial judge may presume that the plaintiff's counsel was sufficiently careful of his client's interests to draft a good complaint, yet, under the statute, an objection for want of sufficient facts may be made to the complaint for the first time in this court, and where, as in the present case, the objection is well taken, we are compelled to reverse the judgment.

Reversed at appellee's costs, with instructions to the court below to dismiss the case unless the complaint be amended so as to state a good cause of action.

Filed May 13, 1884.

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ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—In the brief of the appellee on the petition for a rehearing, it is argued that the complaint is good for special damages, and it is tacitly conceded that it was not sufficient to entitle appellee to recover the statutory penalty. We think it is clearly demonstrated in the opinion heretofore filed that the complaint shows that no special damages were sustained, and, if this be true, there is, of course, no right of action.

It is plain that the theory of the complaint was that the appellee was entitled to the statutory penalty, and it is evident from its whole scope and tenor that the pleader intended to present a cause of action upon that theory, and no other. The object of pleading is to present, in a distinct and definite form, questions of fact for trial, and this object can not be accomplished unless parties are required to state positively the facts upon which they rely, and in accordance with a distinct, definite and controlling theory. If ambiguous pleadings are tolerated, no issue can be framed which will present in an intelligible form questions for trial, and perplexity and confusion will necessarily result. It is no great hardship to require obedience to rules of pleading and logic, and not to do so will result in the evil of leaving disputants without a direct issue, and the courts without the means of determining the competency or relevancy of evidence. In order to bring the parties to an issue, it is necessary to require them to make their pleadings conform to some definite theory, and to be sufficient upon that theory. The theory is to be determined from the general scope and averments of the pleading, and not from isolated or detached averments. Our cases have steadily maintained the rule that a pleading must proceed on a definite theory, must be good on that theory, and must be judged by its general tenor and scope. *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Mescall v. Tully*, 91 Ind. 96; *Platter v. City of Seymour*, 86 Ind. 323; *Johnston v. Griest*, 85 Ind.

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503; *Jackson School Tp. v. Farlow*, 75 Ind. 118; *Neidefer v. Chastain*, 71 Ind. 363, S. C., 36 Am. R. 198; *Kimble v. Christie*, 55 Ind. 140.

A complaint for the recovery of a penalty must be good for that purpose, and not for some other, since to rule otherwise would put it in a plaintiff's power to make an elastic pleading, changeable to meet the exigencies of his case. Of course, causes of action may be stated in different paragraphs, but in such cases each paragraph must be complete in itself. The cause of action under discussion is set forth in a single paragraph, and was framed on a single theory, and it can not be controlled by the isolated averment which it is now claimed makes it good on another and distinct theory.

The appellee did not file a brief until after the cause had been decided, and the long established rule would have warranted us in disregarding the points made on the petition, but, under the peculiar circumstances of the case, we have deemed it proper to except it from the operation of the rule.

Petition overruled.

Filed June 7, 1884.

No. 11,240.

SHIRK ET AL. v. MOORE ET AL.

COUNTY COMMISSIONERS.—*Appeal.—Transcript.—Bond.—Approval.—Dismissal.*—There is no error in the dismissal of an appeal from the board of county commissioners, when it appears that no appeal bond, approved by the county auditor, and no complete transcript of the proceedings of the county board, were filed in the circuit court.

From the Delaware Circuit Court.

O. J. Lotz and F. Ellis, for appellants.

J. S. Buckles and J. W. Ryan, for appellees.

Howk, J.—The record of this cause shows that on the 17th day of April, 1882, the appellants, Adam Shirk and others,

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filed in the clerk's office of the court below, among numerous original papers, a "transcript on appeal to said court from the board of commissioners of Delaware county." Afterwards, the appellees, Daniel B. Moore and others, appeared and moved the court in writing to dismiss such appeal for the following reasons: "1. Because the same is unauthorized by law; 2. Because the court has no jurisdiction; 3. Because the appeal is not taken from the judgment of any court; 4. Because not taken from any final judgment of the board of commissioners." This motion was sustained by the court, and the appeal was dismissed at the appellants' costs; and judgment was rendered accordingly.

Did the circuit court err in dismissing the appeal thereto from the board of commissioners? We are of opinion that this question must be answered in the negative. The appeal to the circuit court was attempted and intended to be taken from certain proceedings of the board of commissioners, upon the petition of the appellees for the location and construction of a certain free gravel road, in accordance with the provisions of the act of March 3d, 1877. Such a petition is the first thing appearing in the record filed in this court, but it is not shown when it was presented to the county board, or, indeed, that it was ever so presented. In section 5772, R. S. 1881, it is provided that "From any decision of such commissioners there shall be allowed an appeal to the circuit court by any person aggrieved." In the next section, 5773, it is provided that "Such appeal shall be taken within thirty days after the time such decision was made by the appellant filing with the county auditor a bond," etc., "to be approved by said auditor," etc. The record before us fails to show that any bond was filed by the appellants with and approved by the county auditor within thirty days after the decision was made, or at any time afterwards. In the next section, 5774, it is provided as follows: "Within twenty days after the filing of such appeal bond, the auditor shall make out a complete transcript of the proceedings of said board relating to the proceeding

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appealed from, and shall deliver the same, and all the papers and documents filed in such proceeding, and the appeal bond, to the clerk of the court to which the appeal is taken."

It is not shown in the record of this cause that a complete transcript of the proceedings of the county board, upon the appellees' petition, was ever filed in the circuit court. On the contrary, it is clearly shown by the transcript there filed, which is set out in the record before us, that it was not a complete transcript of the proceedings of the board upon such petition. It purports on its face to be a transcript merely of the proceedings of the board on the 15th day of March, 1882. We have already said that it does not appear from the record filed in this court when the appellees' petition was presented to the county board; but the transcript filed in the circuit court shows that such petition was before the county board at its December term, 1881, and that some action was then had thereon. This transcript began as follows:

"Come now William Truitt, engineer, and William A. McClellan, John Linville and Duncan Williams, viewers, appointed at the regular December term of this board, and submit their report as such engineer and viewers, as follows, to wit: (Here insert)."

The transcript does not contain the proceedings of the board at its "regular December term," and manifestly, therefore, it is not "a complete transcript of the proceedings of said board."

In the absence from the record of a complete transcript of the proceedings of the county board appealed from, and of any appeal bond, approved as aforesaid, by which an appeal is taken, we think the circuit court was justified in holding as it did, that the appellants had not perfected their appeal in such manner as to give it jurisdiction thereof. We conclude, therefore, that the court committed no error in sustaining the appellees' motion to dismiss such appeal. *Shepherd v. Dodd*, 15 Ind. 217; *Mo Vey v. Heavenridge*, 30 Ind. 100; *Scotten v. Divelbiss*, 46 Ind. 301; *Leffel v. Obenchain*, 90 Ind. 50.

Jones, Administrator, v. Johnson.

Besides, the written report of the engineer and viewers, to which the appellants filed written exceptions, is not a part of the record. In the absence of this report, we must hold that the circuit court was authorized to dismiss the appeal, and that, in so doing, its ruling was not erroneous. *Purviance v. Drover*, 20 Ind. 238.

The judgment is affirmed, with costs.

Filed June 7, 1884.

No. 11,357.

JONES, ADMINISTRATOR, v. JOHNSON.

PRACTICE.—*Motion to Stay Proceedings.*—*Counter Affidavits.*—*Costs.*—*Discretion of Court.*—Upon affidavit an order was made to stay proceedings in a cause until the costs of a former suit for the same cause of action should be paid. After a delay of seventeen days the plaintiff offered to file a counter affidavit, not accounting for his delay. The refusal of leave was not error.

From the Clinton Circuit Court.

J. L. Miller, for appellant.

L. McClurg, W. R. Moore, R. P. Davidson and J. C. Davidson, for appellee.

HAMMOND, J.—This was an action by the appellant against the appellee to foreclose a mortgage.

It appears from the record that, on the 12th day of the March term, 1883, of the court below, the defendant moved, upon affidavit, for stay of proceedings in the case until payment of costs of a former suit. This motion, on the 23d day of the same term, was sustained, and an order was made staying proceedings in the case until the appellant should pay the costs of such former action. The appellant excepted to the ruling and to the order, but as the affidavit upon which the appellee's motion was based is not in the record either by bill of exceptions or order of court, we must presume in favor of

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the correctness of the court's ruling. Afterwards, on the forty-second day of the same term, the appellant offered to file a counter affidavit to the appellee's affidavit for stay of proceedings, but the court refused to permit it to be filed, and to this ruling the appellant excepted.

Without deciding whether the affidavit, if filed, or offered to be filed, at the proper time, would have been sufficient to defeat the appellee's motion for stay of proceedings, we can not say that there was any error in refusing to allow it to be filed at the time it was presented. The appellee's motion, made on the twelfth, was sustained on the twenty-third day of the term. The appellant did not, before it was sustained, offer to file any counter affidavit, nor ask for time for that purpose. His affidavit offered to be filed on the forty-second day of the term gave no excuse whatever for the delay, nor did it disclose any reason why the appellee's motion should not have been granted, which did not exist at the time it was sustained. A very large discretion is necessarily reposed in the trial courts in such matters as pertain to the present appeal, and unless the record presents a palpable abuse of such discretion, this court can not interfere. No such abuse is shown in the present case.

Judgment affirmed, with costs.

Filed June 17, 1884.

 No. 10,962.

ROLLER v. BLAIR ET AL.

MARRIED WOMAN.—Parties.—Husband and Wife.—A husband may unite with his wife in a suit concerning her separate property, and no averment of his interest other than the marital relation is necessary in the complaint.

SAME.—Fraud.—Complaint.—In a suit by husband and wife for fraud upon the wife, affecting her separate property, it is not necessary to aver that the husband was deceived; and where by false representations she is put off her guard, so that she does not use ordinary prudence to ascer-

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tain the facts by examining a public record of a distant county, an action will lie if the purpose of the defendant was fraudulent, and he professed to know the facts, though he did not.

From the Miami Circuit Court.

E. T. Reasoner and *R. J. Loveland*, for appellant.

J. L. Farrar, J. Farrar and *W. C. Farrar*, for appellees.

ELLIOTT, C. J.—The complaint in this case alleges that the appellees, plaintiffs below, are husband and wife; that the wife, Elizabeth, was one of the children and heirs of Jacob Harter, deceased, who died in Miami county, Indiana, the owner of valuable real and personal property; that the value of his property, over and above all indebtedness, was \$3,119.16, and to one-third of that sum Elizabeth was entitled; that long before the date of the death of her father she had resided in Wells county, Indiana; that on the 29th day of May, 1879, the appellant came to her house for the purpose of buying her interest in the estate of her father, and to induce her to sell it to him at a price far below its value, he falsely represented that the estate was insolvent, and that she would get nothing from it; that he held a mortgage for \$1,800 against the land, and that it and other encumbrances would exhaust all the land. It is further alleged that the appellee, knowing nothing of the condition of her father's estate, trusted to the appellant, and relying upon his representation, sold him her interest therein. The falsity of the representations is shown by proper averments, and there are proper allegations of injury.

A husband may unite with his wife in an action concerning her separate property and estate. Where the complaint shows the existence of the marital relation, it is not necessary to make a further statement of the husband's interest in the subject-matter of the action.

The complaint avers, and the demurrer admits, that the property described in the complaint belonged to the wife, and as it was obtained from her by fraud the legal injury was to

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her, and she, therefore, has a cause of action. The person who sustains an injury from the fraud of another is the person entitled to sue.

Where fraudulent representations are alleged to have been made to the wife, and are shown to have deceived her, it is not necessary to go further and show that they also deceived the husband. A cause of action is shown when it is made to appear that the wife was deceived and defrauded, and the wrong-doer can not escape the consequences of his fraud by asserting that he did not also deceive and overreach the husband.

It is true that parties dealing with each other, in cases where there are no fiduciary relations or relations of trust and confidence, are bound to the exercise of reasonable diligence and prudence, but, ordinarily, this rule will not shield one who falsely represents a fact as known to him to exist, and by means of the false statement prevents an examination of a public record. Certainly, the general rule can not apply to a case like this, where the record was many miles from the place where the representations were made.

Where a party professing to have knowledge falsely represents a thing to exist, and makes the representation for the purpose of securing an undue advantage over the person with whom he is contracting, he is guilty of fraud, although it may not appear that he knew that his statement was false. If the representation is made for a fraudulent purpose, and it induces another to act to his injury, the person by whom it was made can not escape liability on the ground that he did not know that his representation was untrue. *Bethell v. Bethell*, 92 Ind. 318; *Frenzel v. Miller*, 37 Ind. 1 (10 Am. R. 62).

A motion for a *venire de novo* does not search the record. We can not disturb the verdict upon the evidence.

Judgment affirmed.

Filed June 6, 1884.

Wren v. The City of Indianapolis.

No. 10,030.

WREN v. THE CITY OF INDIANAPOLIS.

CITY.—Street Improvements.—Estimates.—Mandate.—Parties.—Mandate lies against a city as a corporation at the suit of a contractor, to compel the making of correct estimates of work done by him in the improvement of its streets, according to the terms of his contract, so far as the same may be chargeable to abutting real estate, and neither the city engineer nor any other city officer is a necessary party.

SAME.—Letting of Contract.—Ordinance.—Complaint.—In such case the city can not object, on demurrer, to the complaint, that it does not show that the letting of the work was properly advertised, or that a grade was fixed by the ordinance providing for the improvement, or that the work was not finished according to contract, the city's fault preventing; and where it is averred that the ordinance was passed by a unanimous vote of the council, it is not necessary, in view of the statute, R. S. 1881, section 3164, to allege that there was a petition therefor.

PRACTICE.—Mandate.—Jurisdiction.—In a proceeding for mandamus, jurisdiction is acquired not by summons, but by an alternative writ; this writ may be waived by an appearance, and the complaint or application may be tested by demurrer.

From the Superior Court of Marion County.

T. A. Hendricks, A. W. Hendricks, C. Baker, O. B. Hord, A. Barker, E. Daniels, J. C. Denny and E. T. Johnson, for appellant.
C. S. Denny, for appellee.

ZOLLARS, J.—In appellant's complaint against the city of Indianapolis, its board of aldermen, common council, and civil engineer, Robert M. Pattison, he asks for a mandate to compel the making of an estimate and assessment for a street improvement. The averments of the complaint are substantially as follows:

On the 28th day of June, 1865, the common council of the city, by an unanimous vote, passed an ordinance for the grading and gravelling of South Tennessee street, and the sidewalks, between Garden and McCarty streets. The ordinance provided that the expense of the grading and gravelling, except at the crossing of streets and alleys, should be assessed against and collected from the owners of lots abutting upon the street. It further provided for the width of the grading and gravelling, and the manner of the gravelling.

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| 158 | 206 |

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| 162 | 588 |
| 162 | 588 |

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| 170 | 541 |

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There was no further provision in relation to the grading, except that the engineer was directed to set the proper stakes. The engineer was therein further directed to advertise for sealed proposals for the doing of the work. The contract was awarded to appellant, and on the 28th day of August, 1865, a written contract was entered into by appellant and the city. In this the amounts to be received by appellant for the grading and gravelling were separately stated.

It was also stipulated that appellant should collect from the property-owners, at his own expense, except for the portion occupied by cross streets and alleys, which was to be paid by the city. The manner and character of the grading and gravelling were provided for as in the ordinance. The work was to be finished on or before the 15th day of December, 1865, to the satisfaction of the engineer. If not so finished, the common council was to have the privilege of re-letting the contract. After the written contract was entered into, appellant and the city engineer made a verbal contract that the improvement should be extended north and south, so as to include the crossings of Garden and McCarty streets. The work upon the extension was to be of the same character as provided in the written contract for other portions of the street, and was to be paid for by the city at the rates fixed in that contract. By various acts of the common council and board of aldermen, this verbal agreement was approved and ratified. On account of delays caused by the city, the time for the completion of the work was extended until the 31st day of October, 1870.

On a portion of Tennessee street within the limits of the improvement contracted for, to wit, a square between Garden and Merrill streets, there was a railroad track owned and controlled by a mill company. This track was there by the license of the city. It was on a level with the grade as fixed by the engineer. In order to gravel the street to the depth of sixteen inches, as provided in the contract, it was necessary that the track should be raised that much. Before, and

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at the time the contract was made, and continuously thereafter, the common council and the city engineer represented and promised to appellant that the track would and should be raised by the owners, or the city, so as not to interfere with the completion of the work upon the street. Upon these representations and promises appellant relied, and in such reliance entered into the contract. Appellant gravelled the street and completed the work up to the track, on either side, and placed in close proximity a sufficient amount of gravel to cover that portion occupied by the railroad track, which gravel could have been spread in one hour's time. He then demanded of the city, its council and engineer that the track should be removed or raised so that he might complete the work. This they neglected and refused, and ordered him to cover the track with the gravel. When he was proceeding to do this, he was enjoined by the circuit court at the suit of the mill company.

After this the city refused to permit appellant to spread the gravel on the portion of the street so occupied by the railroad track.

Two branches of Pogue's run crossed Tennessee street within the limits of the improvement. At the time the contract was made, and during the progress of the work, there was an ordinance in force which made it unlawful to in any way obstruct the stream or place material of any kind in its channel. The contract was entered into with reference to this ordinance, which was known to the contracting parties. Before, and at the time the contract was entered into, the common council and officers of the city represented to appellant that these branches of Pogue's run should and would be bridged by the city, so that the contract might be completed within the time limited.

Appellant proceeded with the work, and under the order of the city engineer he delivered a large and sufficient amount of earth and gravel along and upon the banks of both branches

of the stream, to complete the improvement up to the bridges. Nothing remained but to pack the earth against the abutments of the bridges, and place the gravel, which would have taken but a few hours, by the working force appellant then had. The work that was then done was done to the satisfaction of the engineer, and all was done that it was possible to do until the removal or raising of the railroad track and the building of the bridge abutments. These the city neglected and refused, and still refuses to build. At this point the city, through its common council, served a notice upon appellant to suspend further work. After this appellant demanded of the engineer, the city, and its common council, that the proper measurements, estimates and assessments should be made. That was refused. Afterwards, and on the 20th day of September, 1866, Pogue's run became so swollen that the waters overflowed its banks and washed away the earth and gravel placed thereon, and tore and washed away portions of the graded and gravelled street adjoining, causing a loss to appellant of \$2,400, which would not have occurred had the bridges been built as promised by the city.

Before this flood the common council made a partial estimate in favor of appellant, amounting to \$720.40, which he collected.

In December, 1866, the engineer made and submitted to the common council a report which was adopted, and which the defendants claimed, and now claim, was a final estimate. Appellant claimed, and still claims, that the estimate was incomplete, erroneous and false, in six particulars, as follows:

First. It contained no estimate on account of 1,744 cubic yards of grading by excavation, which had been done by him, and which constituted a part of the improvement under the contract.

Second. It contained no estimate or account of, and gave him no credit for, that portion, to wit, 870 cubic yards of grading; 600 cubic yards of gravelling; 630 cubic yards of

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earth, not spread, and 250 cubic yards of gravel, not spread, which had previously been carried away by the flood.

Third. It erroneously and falsely stated that the entire grading by embankment done by appellant was only 2,307.4 cubic yards, when, in truth and fact, the same was 10,502.8 cubic yards.

Fourth. It erroneously and falsely stated that the entire gravelling done was but 2,070.2 cubic yards, when, in truth and in fact, the same was 2,221.3 cubic yards.

Fifth. The pretended quantities of the work and materials set forth in the pretended estimate were not ascertained by actual measurement, but by erroneous calculations from the supposed or pretended notes of a former engineer.

Sixth. It erroneously and falsely states that the total value of said work and materials was \$4,928.12, when, in truth and fact, the value of the same was \$12,127.42.

Appellant, claiming and asserting that the estimate was but a partial estimate, subsequently received payment of the amount, less \$725.40, which he had previously received upon the first partial estimate, and less the sum of \$725.42, which the city still retains.

It is further averred that the common council, well knowing that the estimate was imperfect, incomplete and false in the particulars mentioned, ordered a new and full estimate to be made. Acting under this order, the engineer, in September, 1869, made and submitted another estimate, which was adopted by the common council, and which the engineer, the city, and common council pretended and claimed, and still claim, was a full and complete estimate of all the work done and materials furnished upon all the crossings of streets and alleys included within the limits of the improvement. It is claimed that this estimate is incomplete, imperfect, erroneous and false, in five particulars stated. These are much the same as those above stated.

It is further averred that there is still due appellant for work done and materials furnished, exclusive of the crossings

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of streets and alleys, \$5,387.03; and for work done and materials furnished upon said crossings, \$1,812.97, with interest.

Appellant has often demanded of the defendants that the work be measured, that a full, complete and final estimate be made and assessed, and that his liens for the price and value of the work, except at the street and alley crossings, be established against the owners of property abutting upon the street, and that the value of so much thereof as is occupied by said crossings be paid to him by the city in the manner provided in the contract, all of which has been refused.

Upon the filing of this complaint a summons was issued and served upon the mayor of the city, the president of the board of aldermen, and upon the mayor, as *ex officio* the presiding officer of the common council.

The mode of acquiring jurisdiction over the defendant in a proceeding of this character is not by the service of a summons, but by an alternative writ of mandate. Section 1170, R. S. 1881; *Potts v. State, ex rel.*, 75 Ind. 336. The board of aldermen and the common council did not appear, nor was any kind of default taken or attempted against them. As to them no action at all was taken. It is clear, therefore, that they are not before the court, so that a direct judgment may be rendered against them, and that the case must be disposed of as though they were not named as defendants. The city and the engineer appeared, and separately demurred to the complaint for want of sufficient facts. This appearance was a waiver of the alternative writ as to them. Having thus appeared, they might test the sufficiency of the complaint or application by demurrer. *Pfister v. State, ex rel.*, 82 Ind. 382; *Gill v. State, ex rel.*, 72 Ind. 266.

The demurrers were sustained by the court below, appellant excepted, and assigns the ruling as error. Since the appeal has been pending here, the engineer, Pattison, has died; his death has been suggested and noted upon the record. Whether or not his successor in office might have been substituted, we need not decide, as there has been no effort to have it done.

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The case must, therefore, be disposed of as between the appellant and the city alone. Preliminary to a consideration of the questions raised by the demurrer, it is insisted by counsel for appellee that there is no judgment from which an appeal can be taken.

The case was assigned to room 2 of the superior court. The demurrer was there sustained, and, appellant declining to amend, judgment was rendered against him. On appeal to the general term, two of the judges, having been engaged as counsel prior to their election, declined to act, and the judgment of the special term was affirmed by the single judge, who decided the case at special term. From this judgment the appeal is taken here.

The contention is that appellant should have had the case transferred to the circuit court before it reached the general term, under section 18, 2 R. S. 1876, p. 26. There is nothing in the record to show that appellant knew of the disqualification of the judges until they declined to act. What should be the proper practice in such a case under the above section, or whether or not it has been superseded by section 1362, R. S. 1881, we need not now decide.

Appellee did not object to the one judge acting and affirming the judgment at special term, and we think it is too late for it to object for the first time in this court; and, besides, there is no motion here to dismiss the appeal, nor is there any assignment of cross errors. The question sought to be raised is not presented by, nor is it involved in, the ruling upon the demurrer, which is the only assignment in this court.

It is contended further by counsel for appellee that this action can not be maintained against the city of Indianapolis; that, if maintainable at all, the action should have been against the members of the common council and the engineer individually, in their official capacity.

The statute provides that writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of any act which the law specially en-

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joins, or a duty resulting from an office, trust or station. Section 1168, R. S. 1881. That the statute authorizes the writ to issue to a corporation there can be no doubt. Does the term "corporation," as used in the statute, include such corporations as cities. There has been no direct ruling by this court upon the question as here presented. Numerous cases for mandate against corporations, some of them cities, are reported in the books. It is not apparent that there was any controversy as to the right to prosecute them against the corporations. The fact that the court made no question is a tacit acquiescence in that right. The case of *City of Indianapolis v. Patterson*, 33 Ind. 157, was an application for a mandate to compel the correction of an estimate and assessment for a street improvement, and the issuing of a precept. The case of *City of Madison v. Korbly*, 32 Ind. 74, was an application for a mandate against the city to reinstate a city attorney who had been removed by the common council. The case was prosecuted to the end against the city alone. See, also, *Indianapolis, etc., R. R. Co. v. State, ex rel.*, 37 Ind. 489; *Board, etc., v. State, ex rel.*, 15 Ind. 250. *Board, etc., v. State, ex rel.*, 61 Ind. 75. This case was prosecuted against the board as a corporation. So treating the board, WORDEN, J., speaking for the court, held that, in analogy to the statute providing that process against a corporation may be served upon the president, presiding officer, etc., the service of the alternative writ upon the president was sufficient.

The early doctrine of some of the English courts seems to have been that the *mandamus* should be directed to the body politic, by its corporate name, and that if not so directed, but to the mayor and aldermen of the municipality, it might be quashed. High Ex. Legal Rem., section 442, and cases cited; Grant Corp. 355, note a.

The doctrine as established in this country seems to be that the action may be maintained against both the municipal corporation and the common council, or other officers whose duty it is to act, or against either of them, to enforce the perform-

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ance of a duty incumbent upon the corporation. The action, when brought against the common council, is properly brought against it as a body, and not against the members individually.

The case of *Commissioners v. Sellev*, 99 U. S. 624, was an action for *mandamus* against the board of commissioners as a corporation. The peremptory writ was ordered against the corporation alone. The court said: "As the corporation can only act through its agents, the courts will operate upon the agents through the corporation. When a copy of the writ which has been ordered is served upon the clerk of the board, it will be served on the corporation, and be equivalent to a command that the persons who may be members of the board shall do what is required. If the members fail to obey, those guilty of disobedience may, if necessary, be punished for the contempt. * * * Those who are members of the board at the time when the board is required to act will be the parties to whom the court will look for the performance of what is demanded."

In the case of *Pegram v. Comm'rs*, 65 N. C. 114, which was for a writ of *mandamus*, it was said: "The county * * is a municipal corporation, and 'its power can only be exercised by the board of commissioners,' etc. 'All acts or proceedings by or against a county in its corporate capacity, shall be in the name of the board of commissioners.' (Acts 1868, ch. 20.) As all the corporate functions of a county are thus to be exercised, the board of commissioners must necessarily have a perpetual existence, continued by members who succeed each other, and the body remains the same notwithstanding a change in the individuals who compose it.

"The county is a public corporation, and has certain public duties to perform, and, according to the provision of the statute above referred to, the writ of *mandamus* must be directed to the board of commissioners, who exercise the corporate powers, * * and the individuals who compose the board at the time of service, must obey the writ." See, also, *People, ex rel., v. City of Bloomington*, 63 Ill. 207; *Maddox v. Graham*, 2 Met. (Ky.)

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56; *State, ex rel., v. City of Madison*, 15 Wis. 33. In this case it was held that the peremptory writ may be directed to, and enforced against, the mayor and common council of the city generally, notwithstanding that the mayor and some of the aldermen may have gone out of office, and others taken their places, subsequent to the service of the alternative writ. *State, ex rel., v. City of Keokuk*, 9 Iowa, 438; *City of Ottawa v. People*, 48 Ill. 233. This was an action against the city alone for a writ of *mandamus*, and was so prosecuted to the end. *State, ex rel., v. City of Milwaukee*, 25 Wis. 122; *Parrott v. City of Bridgeport*, 44 Conn. 180 (26 Am. R. 439); *County Comm'rs v. Bryson*, 13 Fla. 281; *Angell & Ames Corp., section 697*. Mr. Dillon, in his work on municipal corporations, after speaking of the difference between our municipal corporations and those of England, says: "These circumstances influence the direction of a writ, for, as we shall presently see, the writ, in all cases where the duty to be performed rests upon the council, may be directed to the corporation by its corporate name, or to the officers composing the council in their official capacity." Dillon *Munic. Corp.* (3d ed.) sections 871, 872. To the same effect is the ruling in the case of *Village of Glencoe v. People*, 78 Ill. 382. The court in that case said: "The object of the writ is to coerce the performance of a duty which is claimed to be obligatory on the council as a body, without regard to the individuals who compose that body. There might, therefore, be an entire change in the members composing the council, without in anywise affecting the proceeding. The duty sought to be enforced, although to be discharged by one branch of the corporate body, is, nevertheless, a corporate duty, and the proceeding might, with equal propriety, have been against the corporation, the ultimate result being precisely the same. * * * The peremptory writ, however, * * * should be served upon those composing the council at the time of the service."

Our statute provided, and still provides, that for work done

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under a contract, such as that described in the complaint, the common council may make estimates, which shall become a lien upon the ground upon which they are assessed. Section 70, 1 R. S. 1876, p. 304; section 3164, R. S. 1881.

This imposes an imperative corporate duty. The word *may* is the equivalent of *shall*. It is just as much the duty of the city to make the estimate as to issue the precept. *City of Greencastle v. Allen*, 43 Ind. 347; *Chapin v. Osborn*, 29 Ind. 99. To hold otherwise would be to hold that the contractor might be left remediless, as he could recover neither against the city nor property-owners for the improvement adjacent to their property. Section 3163, R. S. 1881; section 69, 1 R. S. 1876, p. 303; *City of Greencastle v. Allen*, *supra*. The duty being thus a corporate duty, the action may be against the corporation and the writ directed to it. It should be served, however, upon those officers of the corporation whose special duty it is to act, in this instance, the common council and board of aldermen. It has been said in some of the cases, that the writ may issue to the civil engineer to compel him to report an estimate to the common council. This may be so in a proper case, but the engineer is not in all cases a necessary party. The law makes it his duty to prepare estimates for work done under contracts with the city, when so directed by the common council. Section 27, 1 R. S. 1876, p. 278; section 3073, R. S. 1881. In that regard the engineer is the agent of the common council. As to the manner and the basis upon which an estimate is to be made, he is subject to the orders of the common council, except as provided in section 3163, R. S. 1881. For disobedience of such orders that body, doubtless, may deal with him. It seems clear to us that until after such direction by the common council, and a disobedience by the engineer, there is no case calling for the intervention of the courts. In the case before us, there is nothing to show that the engineer, in any substantial manner, declined or neglected to obey the instructions of the common council. The fault, if any, has not been

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with him, but with his superior, the common council. Hence he is not a necessary party to this action.

It is further contended by appellee that the complaint does not show that a valid ordinance was passed for the making of the improvement, because it does not thereby affirmatively appear that it was passed in pursuance of a petition from the property owners. The law provides that upon the presentation of such a petition, the common council may pass such ordinances. It also provides that such ordinances may be passed by a two-thirds vote of the common council without such a petition. Section 68, 1 G. & H. 233; section 70, 1 R. S. 1876, p. 304; section 3164, R. S. 1881; *City of Indianapolis v. Imberry*, 17 Ind. 175; *City of Indianapolis v. Mansur*, 15 Ind. 112; *Moberry v. City of Jeffersonville*, 38 Ind. 198; *Ray v. City of Jeffersonville*, 90 Ind. 567.

In the case before us, the averment in the complaint is that the ordinance was passed by the unanimous vote of the common council.

It is contended still further, that the complaint is insufficient because it does not affirmatively appear therein that an advertisement for proposals was made before the letting and execution of the contract.

The law requires such an advertisement, but we think that in this proceeding the city should not be allowed to make that question. Whether or not the property owners may make it, when appellant seeks to enforce an assessment, is a question not before us. Whether they can or not, they may not. Appellant's right to an estimate should not be defeated by assuming that they will; it should rather be presumed that they will pay upon an estimate being made, fixing the amounts.

It is still further insisted by appellee's counsel, that the complaint is insufficient because the ordinance for the improvement does not fix the grade of the street. The ordinance and contract fix the width of the grade. In other particulars they provide for the grading to be done in accordance with stakes to be set by the city civil engineer. Whatever

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might be the force of this objection in other and different proceedings, we think it is not sufficient to defeat appellant's right to the estimate and assessment against the property owners. As before stated, if a proper estimate shall be made, the property owners may pay without question. It may be, too, that the grade of this street, as well as all others, was fixed by a prior and general ordinance, with reference to which this may have been passed and the contract made. However this may be, and whether or not the property owners may urge this objection in resistance to the collection of the estimates, the city is not in a position to urge its own neglect as against the demand for an estimate. Having entered into the contract with appellant, under which he, in good faith, expended his time and money, the city should not be allowed now to refuse the means by which he may be enabled to collect from the property owners. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, and cases cited; *Township v. Talcott*, 19 Wall. 666; *Argenti v. City of San Francisco*, 16 Cal. 255.

Nor can the city, to avoid making the estimate, be heard to urge that the work was not entirely finished, in strict accordance with the contract. Whatever was lacking in this regard is shown to have been entirely by the fault of the city. Surely the city should not be heard now to urge its own wrong, in avoidance of a duty enjoined by the statute, and which is legally and equitably due to appellant. The little to be done to complete the work in accordance with the contract was not done, because of the wrongful neglects and interposition of the city. Appellant is not thus to be defeated in the collection of the amount due for the work done. For that he is clearly entitled to an estimate and payment. For the materials furnished under the contract, which, by the wrong of the city, could not be put in place; for that portion of the materials so furnished, which, by the fault of the city, was washed away by the flood, and for the amount due for the grading and gravelling of cross streets, appellant must look to the city. For these amounts, therefore, he is not en-

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titled to an estimate against the property owners. Neither the law, the ordinance, nor the contract provides for an estimate against the city. Whatever rights appellant may have against the city, he may enforce as well without as with an estimate. He can not, therefore, maintain this action to enforce such an estimate.

As to the amounts to be collected from the property owners, the case is different. As to these, he has no remedy without an estimate. For this reason the courts will enforce the making of such an estimate by *mandamus*.

As shown by the complaint, there is a disagreement as to the grading. It seems to have been claimed on behalf of the city, that appellant is entitled to an estimate and pay for the grading which consisted in fills or embankments, but not for that which was in the way of excavations or cuts. The contract provides generally that for the grading appellant shall receive seventy cents per cubic yard. This clearly includes grading by excavation as well as by filling. Appellant is entitled to an estimate for the full amount of the grading. Whatever may have been the custom of the city in measuring other similar work, under other contracts, it can not control the plain terms of this. Appellant is not only entitled to an estimate, but he is entitled to have it made upon the basis of, and in accordance with, the terms of his contract, so that he may be enabled to collect the full amount due him under the contract. The contract fixes the rights of the parties. The making of an estimate for the work done under it is a ministerial act; it is neither judicial nor discretionary. When the rights and duties of the parties are fixed, as they are by the law and the contract in this case, *mandamus* will lie not only to compel the corporation to act, but to act in such a way as will secure to the other party his rights. If the courts did not possess this power, the contractor would be at the mercy of the city. He has no remedy except by *mandamus*. *People v. Judges*, 20 Wend. 658.

The duty of the city being fixed under the law and the

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contract, the case comes clearly within the statute which provides that *mandamus* will lie to compel the performance of an act which the law specially enjoins, etc. *Gardner v. Haney*, 86 Ind. 17.

That the city and its officers may claim that the estimates already made are final, can not change the case. The facts stated in the complaint show that they are not, in a legal sense, final, because, as yet, appellant has not had an estimate for the full amount of the work done under the contract. To such an estimate he is entitled. There have been no laches on his part that will defeat this right, nor is it barred by any provision of the statute of limitations. For the reasons stated we hold that the complaint states a cause of action, and that the court below erred in sustaining the demurrer. The judgment is, therefore, reversed, with costs.

ELLIOTT, J., did not participate in the decision of this case.

Filed June 17, 1884.

No. 10,882.

LILLY ET AL. v. DUNN, ADMINISTRATOR, ET AL.

MORTGAGE.—Action to Redeem.—Parties.—Joinder of Plaintiffs.—The administrator, widow and heirs at law of a deceased mortgagee may join as plaintiffs in a suit to redeem a senior mortgage.

SAME.—Foreclosure.—Statute of Limitations.—A suit to foreclose a mortgage, not containing a covenant to pay, is barred when the debt secured by it is barred, and, when so barred, a suit by the mortgagee or his representatives to redeem a senior mortgage is also barred.

SAME.—Indemnifying Mortgage.—A suit to foreclose a mortgage given to indemnify the mortgagee on account of liability as surety for the mortgagor, but containing no covenant to pay, is barred by the statute, R. S. 1881, section 292, in six years from the time a cause of action accrues thereon.

SUBROGATION.—Pleading.—A complaint to enforce a right acquired by subrogation should state the facts which give rise to the right claimed.

PRACTICE.—Failure to Plead.—Judgment.—Default.—A failure to plead or make up issues as required justifies a judgment as upon default. R. S. 1881, section 401.

From the Superior Court of Marion County.

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| 96 | 220 |
| 126 | 438 |
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| 171 | 91 |

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F. Rand and J. M. Winters, for appellants.

G. W. Galvin, for appellees.

NIBLACK, J.—Complaint by William Max Dunn, administrator of the estate of John P. Dunn, deceased, Margaret E. Dunn, the widow, and William M. Dunn, William Dunn, Isaac Dunn, Margaret Dunn and Priscilla B. Dunlevy, the children of the decedent, against John O. D. Lilly, Mary E. Lilly, Charles T. Wesley, Henry J. Swift and George W. Atkins, charging that in the lifetime of the said John P. Dunn, that is to say, on the 25th day of January, 1855, one Allen May, who was then the owner of the real estate hereafter described, and his wife Sinah May, executed and delivered to the said John P. Dunn, together with James P. Drake and Michael G. Bright, a mortgage on block number eight (8) in Drake's addition to the city of Indianapolis in this State, with other real property, to indemnify and secure him, the said John P. Dunn, and his co-mortgagees, for large sums of money advanced to him, the said Allen May, to wit, the sum of \$10,000, and to protect them, the said Dunn, Drake and Bright, and each of them severally, from further loss and damage as the sureties of the said Allen May, which mortgage was duly recorded; that at divers times, subsequent to the execution of said mortgage, the said John P. Dunn was compelled to pay and did pay large sums of money as the surety of the said Allen May, amounting in the aggregate to the sum of \$20,000; that to pay said last named sums of money the real estate of the said John P. Dunn was levied upon and sold for one-fifth of its actual value, whereby he suffered loss and sustained damage in the sum of \$100,000; that no part of the said several sums of money so paid by the said John P. Dunn were ever repaid to him; that the said Allen May, about the time the real estate of the said John P. Dunn was being levied upon and sold as herein above stated, departed this life utterly insolvent; that in the year 1861, one Griffin Kelley caused a certain mortgage held by

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him, which was older, and prior to the mortgage above described, to be foreclosed in the Marion Circuit Court upon said block number eight (8) in Drake's addition to the city of Indianapolis and other property, making parties defendants to his suit of foreclosure all parties having an interest therein except the said John P. Dunn; that under the decree of foreclosure Lewis Jordan and Isaac C. Johnson became the purchasers of said block number eight (8) for the sum of \$1,100, receiving a deed therefor on the 4th day of January, 1862; that the defendants in this action hold said block number 8 through and by virtue of titles derived from said sale to Jordan and Johnson; that the said John P. Dunn died on the 31st day of December, 1868, and letters of administration upon his estate, unadministered, were, on the 29th day of April, 1877, issued to the plaintiff William Max Dunn. Wherefore the plaintiffs demanded that they be allowed to redeem said block number eight (8) from the sale under Kelley's decree of foreclosure; that a commissioner be appointed to ascertain and report the amount the defendants are entitled to receive as redemption money in the premises, tendering and offering to pay the amount necessary to redeem said real estate, and demanding all other proper relief.

The condition of the mortgage upon which the plaintiffs based their right of action was as follows: "Provided, however, and these presents are on this condition, that if the said Allen May shall well and truly pay all * * * sums of money for which said Dunn, Drake and Bright, or either of them, are or shall become liable as drawers, endorsers or acceptors, or sureties in any way for said May, as the same falls due, and shall fully indemnify and save them harmless from all loss or damages and costs by reason of their liabilities in any way for the accommodation of said May, then this indenture to be void. Otherwise to remain in full force and virtue in law. And it is hereby acknowledged that said Drake, Dunn and Bright, jointly or individually, are liable at this time as ac-

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commodation drawers and endorsers for said May for forty thousand dollars, or thereabouts."

The defendants at special term answered in seven paragraphs. The first was in general denial and the rest set up special matters in defence.

Issues were formed upon the second, third and seventh paragraphs, and the plaintiffs replied, first, special matter, and, secondly, in denial to the fourth and fifth paragraphs. The defendants demurred to the first paragraph of that reply, but the cause was finally disposed of at special term without any decision upon the demurrer to that paragraph.

The sixth paragraph of the answer pleaded the six years' statute of limitations in bar of the action, and, on the 23d day of January, 1882, a demurrer was overruled to that paragraph, and the plaintiffs were then ruled to reply.

On the 23d day of March, 1882, the plaintiffs having failed to reply to said sixth paragraph of answer, final judgment was rendered against them on account of their failure to reply to that paragraph.

The plaintiffs appealed to the general term, where the judgment rendered against them as above was reversed for errors imputed to the special term: *First*. In overruling the demurrer to the sixth paragraph of the answer; *Secondly*. In rendering final judgment against the plaintiffs, as upon default, while issues of fact as well as of law remained undisposed of, and this appeal is by the defendants from the judgment at general term.

The first point made by the defendants is that the administrator of John P. Dunn was the only proper party plaintiff in the proceedings below, and that the complaint was bad in not showing a right of action in all the plaintiffs; that, as the complaint was bad, the appellees were not, in any event, injured by the overruling of the demurrer to the sixth paragraph of the answer.

An administrator is a trustee of the personal estate, and it is the duty of the trustee to protect and defend the title to the trust estate. As the legal title is in him, he alone can sue and

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be sued in a court of law concerning the estate in his hands as trustee. Hill Trustees, 545; Perry Trusts, sections 328, 520.

In equity, however, a different rule prevails. Trustees and *cestuis que trust* are the owners of the whole interest in the trust estate, and, therefore, in suits in equity in relation to the estate by or against strangers, both the trustees and *cestuis que trust*, must, or, at least, generally ought to be parties representing that interest. Hill, *supra*; Perry Trusts, sections 873, 874, 881.

The code of 1852, in force when this suit was commenced, provided, nevertheless, that "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted." 2 R. S. 1876, p. 34, section 4; R. S. 1881, section 252.

Under this section of the statute, the widow and children of John P. Dunn were unnecessarily joined as co-plaintiffs in this action, but as the proceeding was strictly an appeal to the equity jurisdiction of the court below, it can not be held that they had no interest in the subject-matter of the action. As we construe the provision of the code set out as above, it did not absolutely prohibit beneficiaries from being joined as co-plaintiffs in cases in which they might have been theretofore properly joined, or required to be joined, but only dispensed with the necessity of joining beneficiaries in such cases. *Rinker v. Bissell*, 90 Ind. 375.

We can not, therefore, sustain the objection made to the sufficiency of the complaint. The general rule may be said to be that the lien created by a mortgage may be enforced, although the debt which the mortgage was given to secure has been barred by the statute of limitations. This rule is recognized in many, if not most, of the States, upon the theory that statutes of limitations are applicable only to proceedings in the courts of law, and hence not to suits in chancery. The general rule may be further stated to be, that a court of equity is not precluded in a suit for the foreclosure of a mortgage given to secure a debt, from rendering a decree against

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the mortgagor for any remainder of the debt not satisfied by the sale of the mortgaged property, notwithstanding the debt is barred. This is upon the ground that such a decree is only an incident to the decree of foreclosure, and that when a court of equity once takes jurisdiction of a cause, it will retain its jurisdiction until complete relief is afforded.

In some of the States, however, the statutes limit suits in equity in the same manner as actions at law, and in those States the mortgage is held to be in effect extinguished when the mortgage debt is barred.

In the case of *Lord v. Morris*, 18 Cal. 482, the court said: "We do not question the correctness of the general doctrine prevailing in the courts of several of the States, that a mortgage remains in force until the debt, for the security of which it is given, is paid. We only hold that the doctrine has no application under the statute of limitations of this State." It was further said, in the same case: "Here a mortgage is regarded as between the parties, as well as with reference to the rights of the mortgagor in his dealings with third persons, as a mere security, creating a lien or charge upon the property, and not as a conveyance vesting any estate in the premises, either before or after condition broken. Here it confers no right to the possession of the premises either before or after default, and, of course, furnishes no support to the action of ejectment, or to a writ of entry for their recovery. The language of the statute is express, that it shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession without a foreclosure and sale."

Referring to the operations of the statutes of limitations of some of the States in different forms and in certain classes of cases, the court proceeded: "The case is entirely different in this State. Here the statute applies equally to actions at law and to suits in equity. It is directed to the subject-matter and not to the form of the action, or the forum in which the action is prosecuted." The conclusion reached in that

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case in effect was, that when, in California, the debt is barred by the statute of limitations, the mortgage being the incident merely is also barred, or, at least, rendered unavailable for any practical purpose.

It is well settled in this State that a mortgage upon real estate constitutes only a lien upon the land as a security for the debt it is given to secure, the legal title still remaining in the mortgagor, subject to the lien. *Jones Mort.*, section 28; *Fletcher v. Holmes*, 32 Ind. 497; *Favorite v. Deardorff*, 84 Ind. 555.

It is equally well settled that in this State the debt is the principal thing and the mortgage only the incident. *Hubbard v. Harrison*, 38 Ind. 323; *Gabbert v. Schwartz*, 69 Ind. 450.

As we have but one form of action in civil cases, our statute of limitations is applicable to all demands, whether legal or equitable, for the recovery of money. It is directed to the subject-matter, and bars all claims according to the general class to which they respectively belong. It has also been held by this court that a mortgage is inoperative when the debt is void or has been discharged. *Sherman v. Sherman*, 3 Ind. 337; *State v. State Bank*, 5 Ind. 353; *Ledyard v. Chapin*, 6 Ind. 320, *Brisk v. Scott*, 47 Ind. 279; *Tute v. Fletcher*, 77 Ind. 102; *Bowman v. Mitchell*, 79 Ind. 84.

It follows that the rules of construction enunciated in the case of *Lord v. Morris*, *supra*, are fully applicable to the enforcement of mortgage liens in this State, carrying us to the inevitable extent of holding that when the mortgage debt becomes barred the mortgage lien ceases to be effective. *Duty v. Graham*, 12 Texas, 427; *Ross v. Mitchell*, 28 Texas, 150; *Kyger v. Ryley*, 2 Neb. 20; *Peters v. Dunnells*, 5 Neb. 460; *Crow v. Vance*, 4 Iowa, 434; *Burton v. Hintrager*, 18 Iowa, 348; *Newman v. DeCorrimer*, 19 Iowa, 244; *Gower v. Winchester*, 33 Iowa, 303; *Chick v. Willetts*, 2 Kan. 384; *Harris v. Mills*, 28 Ill. 44; *Hagan v. Parsons*, 67 Ill. 170.

This conclusion rests upon the assumption that the mortgage does not contain an express agreement to pay the mortgage debt.

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The act of May 4th, 1852, concerning mortgages, contained the following section: "No mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured, so as to enable the mortgagee, his assigns or representatives, to maintain an action for the recovery of such sum; and where there is no express covenant contained in the mortgage for such payment, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the land mentioned in the mortgage." 2 R. S. 1876, p. 385, section 2; R. S. 1881, section 1087.

As will be readily observed, the mortgage declared on in this case contained no express covenant or undertaking to pay any of the sums of money it was given to secure the repayment of. Neither was it accompanied by any bond or other instrument in writing, binding Allen May to pay or to repay any sum of money. Under such circumstances the demand which John P. Dunn, at the time of his death, held against the estate of Allen May for reimbursement, can not be held to have rested upon a contract in writing, and hence was such a demand as might be barred by the six years' clause of the statute of limitations. Consequently, the court below, at special term, did not err in overruling the demurrer to the sixth paragraph of answer. *Joyce v. Joyce*, 1 Bush, 474; *Prewitt v. Wortham*, 79 Ky. 287; *Rittenhouse v. Levering*, 6 Watts & S. 190; *Bank of Pennsylvania v. Potius*, 10 Watts, 148; *Farmers' Bank v. Gilson*, 6 Pa. St. 51; *Stout v. Stout*, 44 Pa. St. 457; *Neilson v. Fry*, 16 Ohio St. 552; *Brandt Suretyship*, section 267; *Sheldon Subrogation*, section 110; *Leading Cases in Equity*, vol. 1, p. 145, vol. 2, p. 281.

This announcement is not in conflict with the case of *Aetna Life Ins. Co. v. Finch*, 84 Ind. 301, since an examination of the record in that case discloses that the mortgage therein referred to contained an express stipulation for the repayment of the money it was given to secure.

But it is claimed that John P. Dunn became subrogated to

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the rights of the judgment plaintiffs in the judgments which he paid as the surety of Allen May, and that in that way his demand for reimbursement against May's estate was made to rest on the judgments as contracts in writing.

Unfortunately for this claim, the averments of the complaint were insufficient to support it. No reference was made to any particular judgment as having been rendered against John P. Dunn as the surety of May, and, in fact, there was no direct averment that any such a judgment was ever rendered in any court. It does not follow that every payment made by a surety entitles him to subrogation to the rights of the creditor. It is only under particular circumstances that he acquires the right to be thus subrogated. As a general rule, partial payment does not entitle a surety to subrogation. Consequently, a complaint to enforce a claim to subrogation ought to state the particular facts upon which the claim is founded. *Morrow v. United States Mortgage Co.*, ante, p. 21; *Bank of Pennsylvania v. Potius*, supra.

Section 401, R. S. 1881, continuing in force section 69 of the code of 1852, declares that "if, from any cause, either party shall fail to plead or make up the issues within the time prescribed, the court shall forthwith enter judgment as upon a default, unless, for good cause shown, further time be given for pleading, on the payment of the costs occasioned by the delay."

This section confers upon courts the power, and, in the absence of cause shown to the contrary, makes it their duty, to enter judgment as upon default against any party who fails to plead, or to do his part in making up the issues, in a cause, within the time prescribed by the court, and that without reference to the state of the pleadings in other respects. In the very nature of things the entry of judgments for the failure to plead, or to do what is necessary in making up issues, rests very much in the discretion of the *nisi prius* courts. As the record in this cause shows nothing affirmatively to the contrary, we must assume that there was no

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abuse of the court's discretion in entering judgment as upon default in this cause. Two months of unexplained delay, in replying to the sixth paragraph of the answer, was seemingly sufficient to put the appellees in default. As to several questions discussed in this opinion, see Jones Mort., sections 1202, 1203, 1204, 1206, 1207, 1208, 1209.

The judgment at general term is reversed, with costs, and the cause remanded with instructions to affirm the judgment at special term.

Filed June 18, 1884.

No. 10,714.

KASTNER v. PIBILINSKI ET AL.

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| 96 | 229 |
| 157 | 138 |

PROMISSORY NOTE.—Ownership.—Assignor and Assignee.—Interpleader.—

Practice.—In a suit by an assignee of a promissory note, it is not error to permit another, who claims ownership of the note, to intervene by counter-claim, and assert his right thereto.

SAME.—Assignment.—Fraud.—The payee of a non-commercial promissory note, being unable to read or write, and desiring after its maturity to assign it to his daughter as a marriage portion, the prospective son-in-law A., deceiving him as to the terms of the endorsement, fraudulently procured an assignment to himself, and afterwards assigned the note to a *bona fide* purchaser for value.

Held, that the daughter, and not the assignee of A., was entitled to the proceeds of the note.

From the Laporte Circuit Court.

H. B. Tutthill, J. A. Thornton and J. H. Orr, for appellant.

D. J. Wile and F. E. Osborn, for appellees.

ELLIOTT, C. J.—Appellant's complaint is based on a promissory note executed to Michael Badner by George Pibilinski and Peter Gooske, and, as the complaint alleges, assigned by Badner to Carl Goerg, and by him to the appellant. The makers of the note appeared and by answer admitted their liability on the note, and alleged that there was a dispute as to the ownership. Matilda Goerg filed a cross complaint, as—

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serting that she was the owner of the note sued on, and alleging that Carl Goerg had obtained the assignment of the note to be made to him by false and fraudulent pretences. The contest is between the plaintiff and the cross complainant as to the ownership of the note.

It was proper to permit the filing of the cross complaint or counter-claim, for it was upon matters connected with the subject of the action. The rights of all the parties were thus brought before the court and the entire controversy presented for trial. By this course multiplicity of actions and circuitry of litigation were avoided, and yet the rights of all the parties fairly presented for judicial investigation. Where there is a dispute as to the ownership of a note, or of property, it is, as a general rule, proper for a claimant to intervene and assert his title.

The court, at the request of the appellant, made a special finding of facts, and we summarize such as are material to the issue between the appellant and Matilda Goerg: On the 10th day of January, 1882, Carl Goerg borrowed of the appellant \$500, and pledged the note as collateral security, and endorsed it, "Pay Theodore Kastner or order;" the money was loaned in good faith by Kastner, and he had no knowledge of the means by which Goerg had obtained the note; it was not a commercial note, and was past due when the appellant received it. On the 3d day of January, 1882, appellant's assignor, Carl Goerg, was married to the cross complainant, who was then fifteen years of age. Immediately before the marriage her father gave her, as her marriage portion, a large amount of property, and included in this gift was this note, which he gave to her as her absolute and separate property. Carl Goerg fraudulently procured the father, who could neither read nor write, to make and sign the following endorsement: "Pay order of Carl Goerg.

his
"Michael + Badner."
mark

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At the time this endorsement was made the father believed that it was executed to his daughter and not to Goerg. The note was pledged by the cross complainant's husband without her knowledge or consent.

It is only in the strongest and clearest cases that estoppel by conduct can be invoked against an infant. A very different rule applies to a person of non-age from that which operates upon persons of full age. It is only where there is actual fraud that an infant is precluded from asserting his rights. *Carpenter v. Carpenter*, 45 Ind. 142; *Price v. Jennings*, 62 Ind. 111; *Conrad v. Lane*, 26 Minn. 389, S. C., 37 Am. R. 412; *Whitcomb v. Joslyn*, 51 Vt. 79, S. C., 31 Am. R. 678; *Studwell v. Shapter*, 54 N. Y. 249; *Brantley v. Wolf*, 60 Miss. 420; *Schnell v. City of Chicago*, 38 Ill. 382; *McBeth v. Tyabue*, 69 Mo. 642. In the present case the cross complainant is entirely free from wrong, for there was no bad faith on her part.

Neither the cross complainant nor her father put it in the power of Carl Goerg to practice a fraud on the appellant. Neither intended to put trust or confidence in him, but both intended that the legal title to the note should vest in the cross complainant, and they believed that it was so vested by the endorsement. That it did not vest as intended is attributable to the fraud of Goerg, and not to the act of the endorser or the real endorsee. Where a party does not intend to vest property in a person who acquires an apparent title by fraud, and does not intend to put trust or confidence in him, the principle that he who enables one person to practice a fraud on an innocent third person shall suffer the loss, does not apply. The purpose of father and daughter was defeated by Carl Goerg's fraud in inducing the former to sign an altogether different endorsement from the one he intended to execute.

A general rule is that fraud vitiates everything into which it enters, and another general rule is that an assignee takes

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no better title than the assignor had. It is true that there are exceptions to these general rules, but an assignment of a past due non-commercial note, procured by the fraud of the first assignee, is fully within these rules, for the first assignment is vitiated by the fraud, and as the immediate assignee, who practiced the fraud, could acquire no title, he had none to transfer.

The doctrine, that negligence on the part of a maker or endorser of a commercial bill or note will preclude him from defending against an action by a *bona fide* holder, does not obtain in a case where the note assigned is not commercial and is assigned after maturity. Where a commercial note is signed or endorsed, it is marketable in the hands of the holder, and is protected against defences, and men have a right to buy it as an article of commerce, which, by the law, is free from infirmities, but this is not true of a note not commercial and assigned after maturity. Instruments, such as that last named, are not protected in the hands of *bona fide* holders, and one who buys must ascertain whether the person of whom he buys has title, as well as whether the note is subject to defences.

Counsel refer us to the case of *Stoner v. Brown*, 18 Ind. 464, and affirm that it is applicable to this case, but say that it is in conflict with the later case of *Summers v. Hutson*, 48 Ind. 228. We do not agree with counsel, for we think that *Stoner v. Brown*, *supra*, is distinguishable from the present case, as well as from *Summers v. Hutson*, *supra*. In *Stoner v. Brown*, *supra*, the opinion was rested solely on the proposition that the party claiming the note had a mere equitable lien and no legal title. In the case in hand, the assignment of the note was in equity and in law to the cross complainant, and vested in her not an equitable lien, but an absolute title. It is true that the fraud of Carl Goerg made it appear that the assignment was to him, but this was so only because of his own fraud in writing an assignment which he knew the owner of the note did not intend to sign.

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It is fraudulent for one who is directed to prepare a written instrument to express a designated and certain contract, to so write the instrument as to make it express a different contract. *Bethell v. Bethell*, 92 Ind. 318. The fraud of Goerg in making the assignment to himself, instead of making it to the appellee, as he was required and undertook to do, can not change the nature of her title. Equity considers that as done which ought to have been done, and the courts will treat the assignment as expressing what, but for Goerg's perfidy and fraud, it would have expressed.

The decision in *Summers v. Hutson*, *supra*, goes much further than we are required to go in the present case, for there the person who fraudulently wrote the note payable to himself was the agent of the party entitled to the note, and was entrusted by his principal with the transaction of the business in the course of which the note was executed; while here, the man who wrote the endorsement was not an agent, and was not held out as such. The appearance of title which he secured was created by his fraud in falsely representing the character of the instrument which he had written, and procuring the signature of Badner, under the belief that the instrument was one of an altogether different character. It can not, therefore, be justly said that the appearance of title was created by any confidence or trust reposed in Goerg. There is nothing in the case which takes it out of the general rule that the purchaser of past due non-commercial paper must inquire as to the title of his assignor, and as to the defences against the note in the assignor's hands. *Sims v. Wilson*, 47 Ind. 226; *Robeson v. Roberts*, 20 Ind. 155, *vide* opinion p. 161; *Schafer v. Reilly*, 50 N. Y. 61; *Bush v. Lathrop*, 22 N. Y. 535. Judgment affirmed.

Filed June 7, 1884.

Miller v. Harker.

No. 11,272.

MILLER v. HARKER.

CONTINUANCE.—*Affidavit for.*—*Absent Witness.*—*Attorney and Client.*—An affidavit for a continuance because of absent testimony is not sufficient unless it states the facts to which the absent witness can testify; nor is such affidavit sufficient on the ground that the party's counsel is not familiar with his defence, unless it shows that since the withdrawal of former counsel who was familiar with the defence, sufficient time has not elapsed, by the exercise of reasonable diligence, to enable the party to place his counsel in possession of the facts; nor is such affidavit sufficient on the ground of the party's own absence, unless it is shown that such party has a defence to establish.

From the Shelby Circuit Court.

G. W. Cooper, E. P. Ferris, W. W. Spencer and J. S. Ferris,
for appellant.

W. W. Lambert, S. Stansifer and W. D. Stansifer, for appellee.

BEST, C.—This action was brought by the appellee against the appellant, to foreclose a mortgage.

Several defences were interposed, usury, payment, want of consideration and set-off. The cause has been three times tried. The first time a verdict for \$575 was returned, and a new trial granted to the plaintiff. The second time a verdict for \$599.17 was returned, and a new trial granted by agreement. The third time a verdict for \$775 was returned, and judgment rendered upon the verdict. A motion for a new trial, on the ground that the court erred in refusing to continue the cause, was overruled, and this ruling presents the only question in the record.

The affidavit in support of this motion was made by the appellant, and averred, in substance, that "she has a good and sufficient defence to plaintiff's cause of action, as shown by her answers to the complaint;" that she is a competent witness in her own behalf, and that "her testimony is indispensable and necessary to support the defence;" that she had employed the Hon. Francis T. Hord to defend said cause, and that he did defend it during the two preceding

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trials; that since the last trial he has been elected Attorney General of the State, has removed to Indianapolis and withdrawn from the defence of said cause; that since she learned of his withdrawal she has been detained at her home by the sickness of her son, who is confined to his bed with consumption, and who is likely to die any hour; that she has no husband, other children or person to care for said son, and that she can not leave him; that "there is no person familiar with her defence who can conduct it in her absence," etc.

This affidavit was not sufficient to continue the cause because of absent testimony. It failed to allege any material fact to which the appellant could testify, or that the facts constituting her defence could not be proved by other witnesses whose testimony could as readily have been procured. The want of these averments rendered the affidavit insufficient for such purpose. *French v. Blanchard*, 16 Ind. 143.

It was insufficient on the ground that her counsel was not familiar with her defence. It is not stated when she was informed that Hon. Francis T. Hord had withdrawn from the case, and for aught that appears abundant time may thereafter have elapsed to enable her, by the exercise of ordinary diligence, to have employed and fully informed other counsel of her defence. Neither ground of defence seems intricate or difficult, and no reason occurs to us why other counsel may not readily have become familiar with such defence. It is averred, it is true, that she was detained at home by the sickness of her son after she heard of the withdrawal of her attorney, but this alone is no excuse for failing to employ another, and to put him in possession of the facts constituting her defence, if a reasonable time elapsed for such purpose. The contrary is not averred, and therefore we must presume that such time elapsed.

The affidavit was also insufficient on the ground of her absence as a party. If she resided some distance from the place of trial (a point upon which the affidavit is silent), the excuse for her absence was sufficient, but a sufficient excuse

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for her absence did not, of itself, entitle her to a continuance. It must also appear that her presence was necessary in order to establish a defence. If she had none, her presence was not necessary. She says she had a defence "as shown by her answers." Her answers were contradictory; one alleged a want of consideration, another usury as to all except \$330, and another payment in full. A reference to these was not equivalent to the statement of a defence, especially as it was not stated that the facts contained in either were true. In the absence of such statement the affidavit was insufficient in this respect.

The affidavit being insufficient, the motion to continue was properly overruled, and the judgment should therefore be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

Filed June 19, 1884.

No. 11,231.

THE CITY OF CRAWFORDSVILLE v. BOND.

PLEADING.—Complaint.—Defect of Parties.—If a defect of parties does not appear by the averments of a complaint, a demurrer for that cause must be overruled.

SAME.—Demurrer.—Harmless Error.—Where the general denial is pleaded, other paragraphs of answer, only alleging facts which are provable under the general denial, are useless, and there can be no available error in sustaining demurrers to them.

CITY.—Drainage.—Streets.—Liability for Injury by Water.—If a city, by the use of a culvert not constructed by it, damage a citizen by reason of discharging the drainage of its streets upon his lot, it is liable.

SAME.—Surface Water.—If a city, by its system of street improvement and drainage, collect a large body of surface water in one place, it must then provide for its escape without injury to private property, or answer in damages.

From the Montgomery Circuit Court.

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The City of Crawfordsville v. Bond.

*A. Campbell, E. C. Snyder and M. W. Bruner, for appellant.
T. E. Ballard and M. E. Clodfelter, for appellee.*

FRANKLIN, C.—This action was brought by the appellee against the appellant to recover for certain damages alleged to have resulted from the flowing of surface water through a culvert in the road bed of the Indiana, Bloomington and Western Railway. A demurrer was overruled to the complaint, and the defendant answered in six paragraphs, to which demurrers were sustained to all but the sixth, which is a denial. There was a trial by jury; verdict for appellee for \$150. A motion for a new trial was overruled, and judgment rendered upon the verdict.

The errors assigned are: The overruling of the demurrer to the complaint, the sustaining of the demurrers to the first, second, third, fourth and fifth paragraphs of the answer, and the overruling of the motion for a new trial. The demurrer to the complaint stated two grounds of objection, defect of parties, and want of sufficient facts. The first is mainly relied upon. And it is insisted that the Indiana, Bloomington and Western Railway Company should have been made a party defendant. The complaint expressly charges that the defendant committed the wrongs complained of, and says nothing about the railway company having anything to do with them. There may be a cause of action separately against the railway company, or jointly with the defendant; but, if so, it is not shown by this complaint, and we do not think that the question as to whether the railway company ought to be made a party defendant is presented by demurring to the complaint. Where the want of proper parties does not appear in the complaint, if made available, it must be made to appear by answer, or in the evidence under a denial, by proving that the railway company did the acts that caused the injury complained of, and that the defendant had nothing to do with the matter.

There are sufficient facts alleged in the complaint to con-

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stitute a cause of action against the defendant. There was no error in overruling the demurrer to the complaint.

In connection with the overruling of the demurrer to the complaint, appellant's counsel discuss the second specification of error, the sustaining of the demurrer to all the answers except the denial. These special paragraphs of answer, each and all, set up what the railway company had done, and that the defendant had nothing to do with the things complained of. They were each and all nothing more than special denials, and while the general denial was in there was no available error in sustaining the demurrers to these special denials.

Under the motion for a new trial, appellant's counsel complain of the giving of certain instructions, the modification of certain instructions asked, and the refusal to give others that were asked.

In their brief they only insist upon error in refusing to give instructions asked. In order to understand the application of the instructions asked and refused, it is necessary to give the substance of the facts in the case, which are as follows :

In the south part of the city of Crawfordsville, Franklin street runs east and west ; Plum street runs north and south. The I., B. & W. R. W. is located on Franklin street. The appellant owns the lot of land in the southwest angle of the crossing of these streets ; one Krugg owns the lot in the northwest angle of the crossing, and the lot immediately west thereof. The level of the ground, both north and south of Franklin street, and immediately west of said crossing, was below the grade of the street. A depression was in the ground extending from the north and running southeast through Krugg's west lot, entering appellant's lot near the northwest corner, and running diagonally southeast across the same. The drainage of that locality was to the southeast.

When Franklin street was improved and the railroad constructed, a sewer was put under the street and railroad bed at the point of this depression, and extended some distance south into appellee's lot before it emptied, until the depres-

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sion was sufficiently low to allow the water to be discharged therefrom, without overflowing the north part of appellee's lot. Her residence was upon the north part of the lot. She filled up across the north end of her lot for a front yard to her residence, the water being discharged from the sewer south of the filling. Krugg filled up his lots, and there being a north and south alley upon the west side of his west lot, he forced the surface water back upon the alley, and in order to get rid of it constructed a box sewer from the alley to the sewer passing under the grade of the street and railroad.

Under this condition of affairs the city constructed a drain running south along the alley to the railroad grade, at which point, some fifty feet west of the old sewer, the railroad company constructed a culvert in their railroad grade upon a higher level than the old sewer, discharging the surface water into the ditch upon the south side of Franklin street, and the city closed up the old sewer.

The water discharged through the new culvert ran east along the ditch on the south side of Franklin street, until it came to plaintiff's lot, where it overflowed the ditch and flooded her front yard and garden, washed away large quantities of soil, destroyed her garden vegetables, and injured the shrubbery and walks in her front yard. Under this state of facts, shown by the evidence, appellant asked the court to instruct the jury as follows:

"First. If the new culvert was not built by the defendant, but by the railroad company, they should find for the defendant."

The evidence showed that the city had constructed a drain north and south along the alley upon the west side of Krugg's lots to the north side of Franklin street, and a sewer in connection therewith under the north side of Franklin street connecting with a culvert under the track of the railroad put in in part by the railroad company, through which drain, sewer and culvert a large amount of surface water was collected together and passed over and upon plaintiff's premises. The city stopped up the drain that led to the old sewer

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and the sewer itself. There was evidence also showing that the city constructed a part and the railroad company the balance of the new culvert, upon a higher level than the old sewer; that the marshal and street commissioner of the city officers were frequently present while the new culvert was being constructed, inspecting the work on it, and giving the workmen engaged at it directions. The drain in the alley and the sewer in Franklin street to the railroad track were made before the culvert was put in. There was evidence tending to show that the new culvert was jointly put in by the city and the railroad company. The plaintiff complains of the construction of the drain and sewer and the discharge of the surface water through the culvert upon her premises, after having been collected together by the improvements of the city, as much as she does of the construction of the culvert itself. It is doubtless true, that where a railroad company, within the corporate limits of a city, constructs a drain, sewer or culvert for its own use, the railroad company, and not the city, is liable for any damage to property owners thereby. *Stackhouse v. City of Lafayette*, 26 Ind. 17. But if the city uses said water-way it is liable to property owners for any damages resulting from such use in the discharge of its surplus water. This instruction is too narrow; it ignores the city's participation in the construction of the new culvert, and its use of the water-way for the discharge of its surplus surface water. There was no error in refusing to give it.

The second instruction asked substantially stated that if the city did construct the drain along the alley to the right of way of the railroad company, and the water on the north side of the railroad ran into said drain, and the railroad company, at the request of the defendant, then constructed a culvert under said railway and connected the same with the city's drain, they should find for the defendant. We do not see upon what principle of law this instruction ought to have been given. No authority is cited in support of it, nor do we think any can be found.

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The third and fourth instructions asked were given. The fifth reads as follows:

“If the surface water complained of was not collected together in a body by the city, nor diverted from the old sewer by the city, but was thrown back and upon the alley of the city by the filling up of William J. Krugg, and there was no sufficient outlet for said water from said alley, the city had the right, in the protection of its own property, to discharge said water upon a street of said city; and the city would not be liable for damages to any person whose property might incidentally be damaged by said water running down and along the street of the city, and thence across and upon said property, if the overflow does not result from any defect in the plan or mechanism of the work adopted by the city to carry said water off, nor from any defect in the execution of said plan.”

Appellant makes no argument in favor of this instruction, but refers us to the cases of *Cummins v. City of Seymour*, 79 Ind. 491 (41 Am. R. 618), and *Weis v. City of Madison*, 75 Ind. 241 (39 Am. R. 135). In the first case cited it is said: “One would think that the property owner was quite as seriously injured by the lack of skill in devising the plan as he could possibly be by any want of care or skill in the performance of the work. Whether the unskilfulness of the plan or the negligent manner of executing it destroyed the highway, the injury would be the same. The true rule, reasonable in itself and just in its results, is, that the skill and care must extend both to the plan and its execution.” And the second case referred to is cited as authority, which fully sustains it.

It is true that a city has the right to use its streets and public highways for the purpose of drainage, and in making such improvements it is not liable, as a general rule, to abutting land-owners for consequential damages. Such injuries are held to be *damnum absque injuria*. But the facts stated in this complaint, and as shown to exist by the evidence are

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to be regarded as showing, "not a mere consequential injury, resulting from the exercise of a lawful power, but a direct injury by confining in an artificial channel, and pouring upon appellant's land, the surface water which, before the construction of the drains, flowed off without injury to the plaintiff's property." *Weis v. City of Madison, supra*.

A city has no right, even by skilful plans and careful execution, to accumulate, by its system of drainage, "such vast quantities of water at the point in question. It would be under obligation to see to it that there was a way provided for the water to escape without damage to adjoining property owners." *City of Indianapolis v. Lawyer*, 38 Ind. 348.

A city can not lawfully by drains gather surface water into one channel and pour it out, even upon its own street, to the injury of property owners, without making some provision for its escape. But in such cases it must provide some sufficient escape for the water thus gathered together. *Weis v. City of Madison, supra*; *Templeton v. Voshloe*, 72 Ind. 134 (37 Am. R. 150); *City of Evansville v. Decker*, 84 Ind. 325 (43 Am. R. 86); *City of North Vernon v. Voegler*, 89 Ind. 77.

There was no error in refusing to give this instruction, nor in refusing to give the sixth instruction asked, for the reasons stated and authorities cited in relation to the fifth. Appellant refers us to the same authorities in relation to the seventh instruction asked, which again presents the same questions, and for the same reasons we think there was no error in refusing to give this instruction.

The other instructions asked and refused to be given are not referred to in appellant's brief. Any objection, therefore, to the refusal to give them is considered as waived. There is no error in overruling the motion for a new trial.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed June 19, 1884.

Koerner v. The State.

No. 11,700.

KOERNER v. THE STATE.

CRIMINAL LAW.—Death Penalty.—Time of Execution.—Waiver.—Section 1872, R. S. 1881, is imperative that judgment of death shall be executed at a time not less than one hundred days after conviction, and this requirement can not be waived by the defendant.

SAME.—Appeal.—Practice.—Semble, that after an appeal, whereby an error in the judgment as to the time of executing the death penalty has been corrected in obedience to the mandate of the Supreme Court, another appeal will lie for the correction of other and prior errors in the same record.

From the Criminal Court of Marion County.

S. Claypool, W. A. Ketcham and B. F. Watts, for appellant.

ELLIOTT, C. J.—A verdict was returned against the appellant finding him guilty of murder in the first degree, and affixing the punishment of death. On the 10th day of April, 1884, the court informed the appellant of the verdict that had been returned against him, and asked him if he had any cause to show why judgment should not be pronounced, and, no cause being shown, the court pronounced judgment and fixed the time for the execution on the 27th day of June, 1884. The record recites that the appellant and his counsel were present when the judgment was pronounced, and there does not appear to have been any objection to the time fixed, nor was there any agreement as to the time; the appellant simply remained silent. The time fixed for the execution was less than one hundred days from the time judgment was pronounced, and the question is whether the action of the court fixing the time at a shorter period than one hundred days can be sustained.

The statute provides that "The punishment of death, prescribed by law, must be inflicted by hanging by the neck until the person is dead, at such time, not less than one hundred days after conviction, as the court may adjudge." This provision is in terms mandatory, and the connection in which it is

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found adds emphatically to its force. It affects in a high degree the rights of a man condemned to die, and is a matter in which courts, officers and society have an interest; for the executive, charged with the duty of determining whether a pardon is proper, and the courts, in deciding whether the conviction is a just one, require time for full consideration and calm deliberation, and society has an interest in securing to a condemned man ample time to invoke such aid as the law places at his command. The law has fixed the time which shall elapse between the sentence and its execution, and to the law, courts, officers and citizens must yield obedience. The time has been definitely and decisively fixed by the law-makers of the land, and no power, save that of the law-makers, can break down or alter the rule so positively and fully declared. Whether the limit is a wise or an unwise one is not a question for the courts, but is purely a question for the Legislature, and their decision must stand until other legislation shall annul or change it.

There are, it is true, many things that an accused may waive by silence or by agreement. But, in our judgment, a condemned man can not shorten his own life by consenting that he may be hung at an earlier day than that prescribed by an imperative law. Nor do we believe that a man can, by consent or agreement, make it proper to hang him in a manner, or at a time, different from that prescribed by a plain and positive statute. The statute provides that a man condemned to death shall be hung, and we think it clear that no agreement, express or implied, would authorize a court to change the mode of inflicting death to poisoning, beheading or shooting. So, too, our statute prescribes how the execution shall be conducted, and surely the consent of the condemned man would not authorize the court to adjudge that it should be conducted in a manner different from that prescribed. If the court can not, and we think it very clear that it can not, change the method and manner of inflicting the death penalty, it certainly can not fix a time different from that ex-

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pressly prescribed by statute. A man can, as we understand the law, only be executed according to law, and this rule must extend to time, place and manner.

The court below erred in fixing the time of punishment, and so much of the judgment as designates the time of execution must be held to be utterly without force. This question meets us at the very threshold; it stands out on the record so prominently that we can take no step without disposing of it; it must be disposed of at the very outset. We know from a bare inspection of the record that we can make no progress without first settling this question. To grant time would be useless, because we know now that the time fixed for the execution vitiates that much of the judgment, and that the case must go back to the trial court, for the accused is entitled to such a judgment as the statute prescribes, and when that is pronounced he can, if he elects, appeal.

The judgment of this court is that the cause be remanded, with instructions to the trial court to call the appellant before it and pronounce judgment fixing the time of execution at not less than one hundred days from the time of pronouncing judgment under this mandate, and that when the time is fixed in compliance with the mandate of this court, the judgment of the Marion Criminal Court shall be in full force and effect until changed, annulled or reversed by competent authority and in due course of law.

Filed June 19, 1884.

No. 10,038.

MARTIN ET AL. v. PIFER.

EXECUTION.—*Injunction.*—*Practice.*—*Judgment.*—An execution, collectible without relief from appraisement laws, upon a judgment which does not authorize it, must be corrected by motion, and an injunction is not the proper remedy.

JUSTICE OF THE PEACE.—*Judgment.*—*Delay of Entry.*—*Case Distinguished.*—Where a justice does not enter judgment upon a verdict immediately, as

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the statute requires, but delays such entry six days, the delay, though a violation of the statute, does not affect the validity of the judgment. *Burton v. McGregor*, 4 Ind. 550, distinguished.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellants.

R. M. Johnson, E. G. Herr and C. S. Henderson, for appellee.

HAMMOND, J.—This was an action by the appellee against the appellants to have a judgment rendered before a justice of the peace declared void, and to enjoin its collection. Separate demurrers were filed by the appellants to the complaint and overruled. They then answered in two paragraphs, to the second of which the appellee's demurrer was sustained. Trial by the court; finding for the appellee, and judgment on the finding over the appellants' motion for a new trial. The rulings referred to were severally excepted to by the appellants, and are assigned for error in this court.

The appellee alleged in his complaint that the appellant Martin sued him in tort before the appellant Walters, a justice of the peace, claiming damages in the sum of \$10; that a summons was duly issued and served on the appellee to appear before the justice on July 9th, 1881; that he appeared at the time named before said justice in said action; that the cause was regularly submitted to a jury, duly empanelled and sworn; that the jury, after hearing the evidence and considering the same, returned a verdict, in proper form, in favor of said Martin against the appellee on the day aforesaid, in the sum of \$1.40; that immediately upon the return of the verdict the appellee filed a motion for a new trial, which the justice then overruled; but that the justice did not render or enter judgment in said case until after July 14th, 1881.

It is further alleged that on August 9th, 1881, the justice issued an execution upon the judgment, commanding its collection, with costs, without the benefit of appraisal laws,

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and placed said execution in the hands of the appellant Seiss, a constable of the township where the judgment was rendered; that the judgment was not collectible without the benefit of appraisement laws; that the verdict of the jury was wrongful, made upon insufficient evidence, and that the appellee was in no manner indebted to said Martin.

So far as the execution commanded the constable to make the collection without appraisement, it was erroneous. The judgment was not rendered without relief from valuation and appraisement laws; nor would such a judgment have been authorized upon a cause of action growing out of tort. *Smith v. Davis*, 58 Ind. 434. But the appellee had a proper remedy by motion before the justice for the correction of the execution, to make it conform to the judgment. An injunction will not be granted in such case except when necessary to stay proceedings on the execution until the motion can be determined. *Lasselle v. Moore*, 1 Blackf. 226; *Walpole v. Smith*, 4 Blackf. 304; *Culbertson v. Milhollin*, 22 Ind. 362. The complaint does not allege that the motion to correct the execution had been made before the justice, nor does it attempt to make a case for the stay of proceedings on the execution until such motion can be made and determined.

The fact that the verdict was rendered upon insufficient evidence does not, of itself, entitle the appellee to injunctive relief. If he was dissatisfied with the result of the trial before the justice, the law gave him an appeal to the circuit court.

The only possible ground upon which the appellee's complaint can be sustained is upon its averments with regard to the delay of the justice in entering the judgment. The trial was had, the verdict returned, and the motion for a new trial made and overruled on July 9th, 1881. The judgment was not entered upon the justice's docket until after the 14th of the same month. When it was entered does not appear. It may have been on the 15th of that month. At all events, it is not alleged that the entry of the judgment was delayed so

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as to prevent the appellee from taking an appeal within thirty days from the time when it should have been entered.

The question is elaborately and ably argued by counsel upon both sides as to whether the present action is a direct or a collateral attack upon the judgment complained of. We deem it unimportant to enter into this discussion. The law upon the subject may be stated briefly. If the judgment before the justice is not void, but simply irregular, the appellee has no remedy by injunction. But if the judgment is void, then he may properly have it so declared and its collection perpetually enjoined. We proceed, then, to consider the question whether the judgment is void or merely irregular.

Section 58 (section 1489, R. S. 1881), regulating proceedings before justices of the peace in civil actions, provides that "When a suit shall be dismissed, judgment confessed, the verdict of a jury returned, or the defendant be in actual custody, judgment shall be entered and signed immediately; in all other cases, judgment shall be entered and signed within four days after the trial."

The judgment in question having been rendered upon the verdict of the jury should have been entered immediately. It is claimed that the justice failed to do this, and that his failure makes the judgment void. If we are to apply to the word *immediately* the meaning as defined by lexicographers, then the justice upon the return of the verdict was required to enter judgment "without the intervention of any other cause or event." He would have been required to disregard the appellee's motion for a new trial, and, instantly, before doing anything else, to enter judgment. But we are not inclined to the belief that the Legislature used the word with this meaning. The construction, as given generally by courts to the words "immediately" and "forthwith," when they occur in contracts or in statutes, is, that the act referred to should be performed within such convenient time as is reasonably

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requisite. In *Pybus v. Mitford*, 2 Lev. 75, decided more than two centuries ago, it was said: "The word *immediately*, although in strictness it excludes all meantimes, yet to make good the deeds and intents of parties, it shall be construed such convenient time as is reasonably requisite for doing the thing." This construction has prevailed since in most cases which have come to our attention. In *Re Blues*, 5 El. & Bl. 290; *Snowball v. Dixon*, 4 Y. & C. 511; *Thompson v. Gibson*, 8 M. & W. 281; *Richardson v. End*, 43 Wis. 316; *New York Cent'l Ins. Co. v. Nat'l Pro. Ins. Co.*, 20 Barb. 468; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, S. C., 34 Am. R. 323; *Railway, etc., Co. v. Burwell*, 44 Ind. 460.

In the case under consideration the justice's delay, for at least six days, in entering the judgment on the verdict, was quite unreasonable, unless explained by circumstances showing that an earlier entry of it was impracticable. But we have to consider whether such delay rendered the judgment void. The object of the statute in requiring the justice to enter judgment immediately upon the return of the verdict was manifestly for the benefit of the party obtaining the verdict. It was to enable him to reap the advantages of his litigation. The early entry of the judgment could be of no benefit to the other party. In the present case it is not averred in the complaint, nor claimed by the appellee's counsel, that the mere delay in entering the judgment did the appellee any harm. A judgment is the decision of a court upon questions of law or fact. The rendition of a judgment is a judicial act, but the making of a record of it is merely ministerial. Freeman Judg., section 38. The judgment follows the return of a verdict before a justice of the peace as a matter of law. The act of entering it is only ministerial. The delay in making the entry of the judgment for an unreasonable time may subject the justice to a suit for damages by the party in whose favor the verdict was rendered, but it certainly does not render the judgment void where no harm by

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the delay resulted to the judgment defendant. It is said in Freeman upon Judgments, section 53a: "Under the general rule that the entry of a judgment is a ministerial act, the failure of a justice to comply with this part of the law within the time required, has, by repeated decisions, been held to leave the judgment in full force."

In *Matthews v. Houghton*, 11 Maine, 377, it was held that a judgment was valid, the record of which was completed by the justice three years after he was out of office. The court said: "A magistrate does not act *judicially* in making up and completing his record. In doing *this* he performs *himself*, what this court does by the agency of *their clerk*. It is a mere ministerial act."

In *Walrod v. Shuler*, 2 N. Y. 134, the Court of Appeals, under a statute which required a justice of the peace to render and enter judgment in four days after the final submission of the cause, held that a judgment which was entered five days after the trial was valid.

It was said in *Fish v. Emerson*, 44 N. Y. 376: "The act of rendering judgment by the justice is judicial; that of entering it in his docket is ministerial. The judicial functions of the justice are completed when he has rendered his judgment. The duty of rendering judgment where the cause is tried by himself is imperatively to be performed within four days. The duty of entering it in his docket has been held to be directory merely, owing to its ministerial character, and although the time is prescribed by the statute to be four days, within which it is to be done, that is not a limitation upon the power of the justice, but it may be validly performed afterward."

When a statute is merely directory, a thing omitted to be done at the proper time may be performed afterward. *Stayton v. Hulings*, 7 Ind. 144.

It is said by Mr. Sedgwick, in his work on the construction of statutory and constitutional law, p. 316: "When statutes direct certain proceedings to be done in a certain way

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or at a certain time, and a strict compliance with these provisions of time and form does not appear essential to the judicial mind, the proceedings are held valid, though the command of the statute is disregarded or disobeyed." See *Sackett v. State, ex rel.*, 74 Ind. 486.

In *Jones v. Swift*, 94 Ind. 516, this court, in construing section 551, R. S. 1881, which requires a judge to decide an issue of law or fact within sixty days after its submission to his decision, except in case of severe illness of himself or family, held that the same was directory, and that a decision, though not made within the time named, was valid. The same construction was given to a similar statute in *Vogle v. Grace*, 5 Minn. 294.

In the case under consideration there is no question but that the justice had jurisdiction of the subject-matter of the action and of the parties. The appellee, who was the defendant in that case, states in his complaint in this action that he was not only duly served with process, but that he appeared to the action. He contested the right of the plaintiff in that action to recover by a trial before a jury, and when the jury decided against him he applied for a new trial, which was overruled. There was nothing after such motion was overruled for the justice to do but to make an entry of the judgment, which, by the command of the statutes, followed the verdict. The failure to perform this ministerial act for the time stated in the complaint was no doubt an irregularity. But the law is well settled that where a court has jurisdiction of the subject-matter of an action and of the parties to it, the judgment is not void, however irregular the proceedings may have been. *Doe v. Rue*, 4 Blackf. 263 (29 Am. R. 368); *Evans v. Ashby*, 22 Ind. 15; *Waltz v. Borroway*, 25 Ind. 380; *Gavin v. Graydon*, 41 Ind. 559; *Britton v. State, ex rel.*, 54 Ind. 535; *Kennard v. Carter*, 64 Ind. 31; *Reid v. Mitchell*, 93 Ind. 469; *Robertson v. Huffman*, 92 Ind. 247; *Woods v. Brown*, 93 Ind. 164.

The statute (section 1437, R. S. 1881), which requires the

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justice to keep a docket of not less than 200 pages, and to record therein the proceeding in full of all suits instituted before him, with the names of the parties, a copy of the cause of action and of the set-off, if any, and the amount of the judgment written out in words, is quite as imperative in its language as that which requires the justice to enter and sign a judgment immediately upon the return of the verdict. And yet, in *Reed v. Whitton*, 78 Ind. 579, it was held that the statute was merely directory, and that the omission of the justice to copy upon his docket the cause of action did not invalidate the judgment rendered thereon. See, also, *Hopper v. Lucas*, 86 Ind. 43.

It must be conceded that the authorities which we have cited are in conflict with *Burton v. McGregor*, 4 Ind. 550. That was a case, tried by a justice, in which by statute he was required to enter judgment within four days from the submission of the cause. It was held that the entry of the judgment after the four days "was an act *coram non judice*, and void." The only case cited in support of the decision was *Young v. Rummell*, 5 Hill (N. Y.) 60. While there are expressions in the opinion in that case that sustain *Burton v. McGregor*, *supra*, the facts upon which the opinion was based made the case wholly inapplicable as authority upon the point it was cited to support. In that case the justice had never rendered any judgment, and it was, therefore, held that the proceedings had before him were no bar to another action. Without denying the authority of *Burton v. McGregor*, *supra*, it may be distinguished from the present case by the fact that the cause was tried by the justice, and no decision was given and no entry made of the judgment until after four days. In the present case the verdict of the jury fixed the judgment. It followed as a matter of law. The failure of the justice to enter it for several days was merely the omission of a ministerial duty. *Hall v. Tuttle*, 6 Hill, 38, S. C., 40 Am. Dec. 382; *Stephens v. Santee*, 49 N. Y. 35.

Our conclusion is that the judgment in the case before us

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was not void; that the failure to enter it for several days after the trial was, at most, so far as the appellee was concerned, a harmless omission of duty upon the part of the justice; that his remedy for the irregularity of the execution issuing for the collection of the judgment without benefit of appraisal was by motion before the justice for its correction; and that he had a remedy in appeal for a verdict rendered upon insufficient evidence. His complaint makes no case for equitable relief, and the appellants' demurrers thereto should have been sustained. This view of the case dispenses with the consideration of other alleged errors.

Reversed, with costs, with instructions to the court below to sustain each of the appellants' demurrers to the complaint.

Filed April 23, 1884.

ELLIOTT, J.—I do not think the case is one authorizing a party to invoke the extraordinary remedy of injunction. The amount in controversy is so small that it can not be justly said that irreparable or even serious injury, within the meaning of the law, would have been sustained by the appellee, had he been compelled to pay the judgment. There is no collateral question or right dependent upon the decision of the issue whether the appellee shall or shall not pay the small judgment entered against him.

Filed April 23, 1884. Petition for a rehearing overruled June 21, 1884.

No. 9026.

McFADDEN v. WILSON ET AL.

GUARDIAN AND WARD.—*Assignment by Ward.*—*Attorney.*—*Money Had and Received.*—*Complaint.*—A guardian, whose ward had reached full age, made his final report, showing due the ward \$245, and that the money was paid into court, and left it and the money with his attorney, to present to the court, pay in the money and procure his discharge. On the same day, the ward assigned by a writing \$150 of this money to the plaintiffs, but the attorney, upon demand, refused to pay it to them, but

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| 96 | 253 |
| 144 | 506 |
| 145 | 100 |
| 96 | 253 |
| 150 | 343 |
| 152 | 168 |
| 96 | 253 |
| 158 | 537 |
| 96 | 253 |
| 162 | 36 |
| 96 | 253 |
| 163 | 447 |
| 96 | 253 |
| 165 | 104 |

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did pay it to the ward. The complaint against the attorney was in the ordinary form for money had and received.

Held, that the complaint was good, and the plaintiffs were entitled to recover.

From the Shelby Circuit Court.

J. B. McFadden, E. S. Stilwell, B. F. Love and H. C. Morrison, for appellant.

D. L. Wilson, O. B. Phillips, E. K. Adams, T. B. Adams and L. T. Michener, for appellees.

ZOLLARS, J.—This action was commenced by appellees against appellant, on a complaint for money had and received.

Upon a finding of facts, and conclusions of law thereon, judgment was rendered against appellant. Error in the conclusions of law is assigned in this court. It is claimed by appellees, that no question is before us on this assignment of errors, because it does not appear by the record that the special finding of facts was made at the request of either party. They are correct as to the requirements of the law, but mistaken as to the record. There is a statement in the bill of exceptions as follows: "And thereupon the court, at the request of the defendants, made the following special findings, and rendered the following judgment, to wit: See page 12, line 9, to page 16, line 31, of this transcript."

At the pages indicated the special findings and conclusions of law, properly signed by the judge, are set out in full. Being copied into the record by the clerk, they are a part of it without a bill of exceptions, and may be thus referred to without recopying into the bill of exceptions. *Button v. Ferguson*, 11 Ind. 314; Works Pr., section 805; *Cole v. State*, 75 Ind. 511, and cases cited; *Smith v. Lisher*, 23 Ind. 500. The bill of exceptions, we think, sufficiently shows that the special finding of facts was made upon the proper request.

Originally, the complaint consisted of two paragraphs. To each of these a demurrer for want of sufficient facts was filed. As to the first, it was sustained; as to the second, it was overruled. This latter ruling is assigned as error. Omitting

formal parts, the substance of the second paragraph is that appellant is indebted to appellees in the sum of \$150 for money had and received by him to their use, on the 28th day of October, 1879, which he has refused, and still refuses, to pay to them, although the same was demanded of him before suit. It is objected that the facts are not set out with the particularity required by the code. The paragraph is brief, but we think sufficient. *Van Santvoord* Pl. 429; *Alexander v. Gaar*, 15 Ind. 89; *Spears v. Ward*, 48 Ind. 541.

The portion of the special finding of facts necessary to be set out may be summarized as follows: One William C. Davis was the guardian of one John Hillyer, and had in his hands, after the payment of all expenses of the guardianship, \$245. On the 27th day of October, 1879, Hillyer became twenty-one years of age. At that time he was in jail on a criminal charge, and employed appellees as his attorneys. On the day following he executed the following written instrument, which was duly acknowledged before a notary public, viz.: "Know all men by these presents, that I, John Hillyer, for value received, and in consideration of the services of David L. Wilson, Oliver B. Phillips and Ed. K. Adams, in my behalf, as my attorneys in two cases now pending in the Shelby Circuit Court, wherein the State of Indiana is plaintiff and I, the undersigned, defendant, in each of which cases I am charged with grand larceny, hereby transfer, assign and set over to the said Wilson, Phillips and Adams all my right, title, claim and interest in and to all of the money and assets belonging to me now in the hands of William C. Davis, not exceeding the sum of \$150; the said money being in the hands of said Davis, and held by him for my use and benefit in the capacity of guardian of my person and estate; said guardianship having expired on the 27th day of October, A. D. 1879, and said guardian not having as yet made to the court his final report of his said trust. And I do hereby, and by these presents, appoint and select the said Wilson, Phillips and Adams, or either of them, as my attorneys in fact, to receive from the

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said Davis, or from any other person having the custody of the whole, or any part of the said money, the said sum of \$150 of said trust money (to have and to hold the same as their own forever) as fully as I would be entitled to receipt for the same to any person in the custody thereof. In witness whereof," etc. This was signed and acknowledged.

On the day this instrument was executed the guardian, Davis, preparatory to final settlement and discharge from his trust, employed appellant as his attorney to prepare his final report, and also a receipt for Hillyer to execute for the \$245, to be filed as a voucher. This receipt the guardian presented to Hillyer in the presence of appellant, with the request that he should sign it. He declined to do so, saying that he had promised to give his attorneys an order on the guardian for \$150. The final report so prepared contained a statement of the amount due Hillyer, and the further statement, "which amount he, the guardian, now brings into court." Being called away, the guardian left the report and money with appellant, with an agreement that he should file the report and pay the money into court for the purpose of getting a final discharge. While the money was thus in the hands of appellant, one of the appellees presented to him the written instrument above set out, at the same time giving him to understand that he claimed the right to, and the right to receipt for, the sum demanded, viz., \$150.

Appellant refused to pay any sum upon the demand. When the demand was made, Hillyer was present protesting against the payment of the \$150 to appellees, but consenting that \$50 might be paid to appellee Phillips as his portion of the fee. This Phillips refused, unless all was paid. Appellant then stated that as there was a controversy as to the right to the funds, he would pay the same into court; to which Phillips, representing appellees, assented. Subsequently, on the same day, Hillyer demanded of appellant the whole amount of \$245, and appellant, without the knowledge of appellees, paid it over, took his receipt to the guardian, filed and pre-

sented the final report and receipt to the court, and procured the guardian's discharge. Appellees have not received any portion of the \$150 mentioned in the written instrument above set out. Upon the facts so found judgment was rendered in favor of appellees against appellant for \$150. The conclusions of law were excepted to, and the question is before us by a proper assignment of error. It is insisted by appellant that the facts found do not make a case against him under the complaint for money had and received. A standard author, citing cases in support of his statement, gives the following as cases in which an action will lie for money had and received: "An action of assumpsit for money had and received is an equitable remedy that lies in favor of one person against another, when that other person has received money either from the plaintiff himself or third persons, under such circumstances, that in equity and good conscience he ought not to retain the same, and which, *ex æquo et bono*, belongs to the plaintiff." 4 Wait Actions and Defenses, p. 469.

"If the plaintiff's right to the money is established, and the defendant is shown to have received it under such circumstances that he ought not to retain it, the law implies a promise to pay it to the party who ought to have it." 4 Wait Actions and Defenses, p. 469.

"If money is paid to an agent for his principal, or if money is given by one to another to keep for him, and the agent or depositary deposits it in bank in his own name, the principal may recover it of the bank in this form of action." 4 Wait Actions and Defenses, p. 470.

"Whenever a person has money in his possession, however he may have come by it, that belongs to another, and which, *ex æquo et bono*, he has no right to retain, the person to whom it belongs may maintain an action for it, as for money had and received." 4 Wait Actions and Defenses, p. 471.

"So it lies against the assignor of a debt or claim who af-

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terward receives the money thereon from the debtor." 4 Wait Actions and Defenses, p. 473.

Of the numerous cases cited by the author we content ourselves with a reference to the following only: *Bullard v. Hascall*, 25 Mich. 132; *Mason v. Waite*, 17 Mass. 560; *Beardsley v. Root*, 11 Johns. 464 (6 Am. Dec. 386). See, also, *Hunt v. Milligan*, 57 Ind. 141; *Ferguson v. Dunn*, 28 Ind. 58; *Hatten v. Robinson*, 4 Blackf. 479; *McQueen v. State Bank*, 2 Ind. 413; *Muir v. Rand*, 2 Ind. 291.

In the case in hearing, the money in the hands of Davis belonged to the ward, Hillyer. Upon becoming of age the guardianship was at an end; he became immediately entitled to it, and might have maintained an action therefor without previous demand. The duty of Davis was to pay it to him and not into court. *State, ex rel., v. Steele*, 21 Ind. 207; *Stroup v. State, ex rel.*, 70 Ind. 495; *State, ex rel., v. Fleming*, 46 Ind. 206; *Scott v. State, ex rel.*, 46 Ind. 203; *Jones v. Jones*, 91 Ind. 378; *Voris v. State, ex rel.*, 47 Ind. 345; *Stumph v. Pfeiffer*, 58 Ind. 472.

Had the money remained in the hands of Davis, and had Hillyer assigned the whole of it to appellees by a written assignment such as that above set out, there could not be any question about the liability of Davis had he refused to pay it over. And whatever may be the rule at law and the practice in other forums, we think that in equity and under our code, blending law and equity in the practice, Hillyer could make a valid assignment of a part of such fund, and that upon such an assignment Davis would have been liable to the appellees whether he consented to the assignment or not.

After stating the rule at law Judge Story says: "But in cases of this sort, the transaction will have a very different operation in equity. Thus, for instance, if A., having a debt due to him from B., should order it to be paid to C., the order would amount in equity to an assignment of the debt, and would be enforced in equity, although the debtor had not assented thereto. The same principle would apply to the case

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of an assignment of a part of such debt. In each case, a trust would be created in favor of the equitable assignee on the fund, and would constitute an equitable lien upon it." Story Eq., section 1044. See, also, *Morton v. Naylor*, 1 Hill, 583; *McKernan v. Mayhew*, 21 Ind. 291; *Indiana, etc., Co. v. Porter*, 75 Ind. 428; *Groves v. Ruby*, 24 Ind. 418; *Lapping v. Duffy*, 47 Ind. 51.

It is contended in argument that appellant occupied a position different from that of Davis; that having received the money from Davis, with special instructions, he became the agent of Davis, and bound to obey such instructions, and that he can not be made liable for so doing; that Davis, under the instructions given, did not lose control of the money, and hence appellant received and held it as the money of Davis, and not of Hillyer. We think the position not tenable. In the first place, as a matter of fact, appellant did not obey the instructions of Davis. Instead of paying the money into court as directed, he paid it to Hillyer. And as the money did not belong to Davis, but to Hillyer, and as it was the duty of Davis to pay it over to Hillyer and not into court, there can be no doubt that Hillyer had the right to demand it of appellant. Had Hillyer made such demand, and had appellant refused, Hillyer undoubtedly might have maintained an action for it, and appellant could not have sheltered himself behind the instructions from Davis. Nor could Davis have held him liable for paying it over to Hillyer. Hillyer did not object to the custody by appellant. The money in the hands of appellant was there on its way to Hillyer, the rightful owner. In all that Hillyer did and said after it came into the hands of appellant, he ratified the act of Davis in placing it there. Upon such ratification it was not in the power of Davis to recall it, as against the demand of Hillyer. This, if nothing else, distinguishes the case from those cited by appellant, and takes it out of the rulings made in those cases. Appellant received and held the money as the money of Hillyer, and in equity and good conscience could

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not retain it from him. Hillyer, being the owner of the money and entitled to its possession as against appellant, had the undoubted right to assign the whole, or a part of it, to appellees. Upon the execution of the written assignment, appellees instead of Hillyer became entitled to the portion so assigned as against both Hillyer and appellant. This written assignment could not be and was not overthrown by Hillyer's oral objections to appellant paying to appellees the portion so assigned.

No question has been made in this court, nor was any made in the court below, upon the question of proper or necessary parties. Hence we are not called upon to indicate any opinion upon that question. It may be well to say, however, that as the case comes before us, it can not be urged that, by our ruling, we bring ourselves into conflict with a line of cases, holding that a party should not be subjected to several actions, by different assignees.

After a very careful examination of the record, the arguments of counsel, and all of the cases cited, with others, we are of the opinion that the judgment of the trial court should be affirmed. It is therefore affirmed, with costs.

Filed Dec. 18, 1883. Petition for a rehearing overruled June 19, 1884.

 No. 10,659.

LIGGETT v. FIRESTONE ET AL.

REDEMPTION.—*Sheriff's Sale.*—*When Year for Redemption Begins to Run.*
 —The year allowed by statute, R. S. 1881, section 768, for the redemption of real estate sold at sheriff's sale, begins to run on the day that the purchaser completes his purchase by the payment of his bid.

From the Marshall Circuit Court.

J. D. McLaren and *H. Corbin*, for appellant.

A. C. Capron, for appellees.

COLERICK, C.—This action was instituted by the appellant

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| 98 | 260 |
| 129 | 264 |
| 96 | 260 |
| 130 | 265 |
| 96 | 230 |
| 146 | 76 |

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against the appellees Amos C. Miller and John V. Astley as sheriff of Marshall county. After its institution the appellee Josiah Firestone was, by supplemental complaint, made a defendant thereto. Miller and Astley were defaulted; Firestone filed separate demurrers to the amended and supplemental complaints, which were overruled, and, he declining to answer over, final judgment was rendered in favor of the appellant, who, not being satisfied with the judgment rendered in her favor, moved the court for a new trial, which motion was overruled, and from the judgment so rendered she has appealed to this court. The errors assigned are:

1st. That the court erred in overruling the motion for a new trial.

2d. That the court erred in limiting the appellant's right to redeem to less time than one year allowed by the statute.

The amended complaint, in substance, averred that Miller, on the 20th day of January, 1881, recovered a judgment in the Marshall Circuit Court against the appellant and James F. Liggett, her husband, for \$987.46, and the foreclosure of a mortgage executed to him by them, upon certain real estate, which is described in the complaint; that Astley, as such sheriff, on the 5th day of March, 1881, under and by virtue of an order of sale issued upon said judgment, offered said real estate for sale to satisfy said judgment, and that Miller, by his attorney of record, bid therefor \$1,718.62, and, no person bidding more, the same was struck off to him for said sum; that at the time of said sale there was due to Miller, on his judgment, principal and interest, the sum of \$997.41, and the further sum of \$74.05 being the costs of said action and expenses of sale; that Miller, by his said attorney, receipted to the sheriff for the amount of his judgment, and paid said costs and expenses, and, thereupon, said sheriff made out and tendered to Miller a certificate of purchase for said real estate, and demanded of him payment of the balance of said purchase-money, being \$647.16, which he refused to pay, and denied that said attorney had any authority to act for him in

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any manner in said foreclosure proceeding and sale, and asserted that the action had been commenced and prosecuted to judgment, and said sale made, without his knowledge, consent or authority, and that when said suit was commenced he did not own or have any interest in said mortgage, or the debt which it was given to secure, and repudiated all of said proceedings, and declared that he would not be bound by them, and, thereupon, said sheriff commenced proceedings in the Marshall Circuit Court, by notice and motion, against Miller, to recover the balance of said purchase-money, which proceeding was still pending; that said sheriff, by reason of the facts aforesaid, had been prevented from completing his return to said order of sale; that the balance of said purchase-money was due, and that when paid it would belong to the appellant, who was at the time of the execution of said mortgage, and still was, the sole owner of said real estate, and that there were no junior mortgages or other liens thereon at the time of said sale, or since, and that she desires and intends to redeem said real estate within the year allowed by law for redemption after said sale shall be fully consummated by the payment of the purchase-money therefor; that she files her complaint before the expiration of one year from the time said sale was made, so as to save any question as to her right to redeem lapsing or being waived by failing to claim and assert it until after the expiration of the year from the time said real estate was sold by the sheriff. It is also averred in the complaint that Miller is contesting and litigating with the sheriff as to his liability to pay said purchase-money, or any part thereof, for the reasons aforesaid, and that the time of the termination of said litigation is uncertain. Wherefore she prayed that her right to redeem said real estate might be held in abeyance until the final termination of said litigation, and until the completion and consummation of said sale by the payment of said purchase-money, and that the amount which she ought to pay for the redemption of said real estate be ascertained and fixed by the court, and that she be allowed

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one year from the completion of said sale to make said redemption, and other relief.

The material averments in the supplemental complaint were, that after the commencement of this action Firestone petitioned the court, in the proceeding instituted by said sheriff against Miller, as aforesaid, to be made a party thereto, alleging, in his petition, that he was the real party in interest in the action to foreclose said mortgage, and that said real estate was bid off at said sheriff's sale for his benefit, and for him, and not for Miller. It was also therein averred that the court in said proceeding found that the facts alleged by Firestone in his petition were true, and he was made a party to said proceeding, and was ordered by the court to pay to the sheriff the balance of said purchase-money, with interest, and that upon the payment thereof by him the sheriff was directed to execute to him a certificate of sale for said real estate; that Firestone, on the 7th day of July, 1882, paid to the sheriff the amount which he was so ordered by the court to pay, and that said sheriff, on said day, executed to him said certificate of sale, and returned said order of sale, and paid to the clerk of the court the balance of said purchase-money, amounting to \$700.56, and that the same was then in the hands of said clerk, etc.

The action was determined by the court on the 13th day of November, 1882, by the rendition of a judgment in favor of the appellant, by which it was adjudged that she might redeem said real estate on or before the 20th day of January, 1883, by paying to the clerk of the court, for the benefit of Firestone, the sum for which it had been sold, viz., \$1,718.62, with interest thereon from the 5th day of March, 1881. To the rendition of this judgment the appellant excepted. The reasons assigned by her for a new trial were, that the finding and judgment of the court was not sustained by sufficient evidence and was contrary to the evidence, and that said finding and judgment was contrary to law.

We infer from the recitals in the record, that no evidence

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was introduced on the trial of the action. It was unnecessary for the appellant to introduce any proof in support of the averments in her complaint, as the default of Miller and Astley, and the refusal of Firestone, upon the overruling of his demurrers, to answer over, was, under the statute, an admission by them of the truth of all the facts well pleaded in her complaints, and dispensed with and obviated the necessity, which would have otherwise existed, of establishing, by evidence, the facts therein averred. Was the judgment erroneous? The appellant insists that it was, because it limited the time for the redemption of the real estate in dispute to a shorter period than that to which she was entitled under the law. It will be observed, by the allegations in the complaint, original and supplemental, that the property was sold by the sheriff on the 5th day of March, 1881, but the purchase-money therefor was not paid until the 7th day of July, 1882.

The question presented for our consideration is, when did the appellant's right of redemption expire? The determination of the question depends solely upon the correct solution of the inclusive one, when was the sale completed? If it was consummated by the mere sale of the real estate by the sheriff without the payment of the purchase-money, then the time for redemption expired in one year from that time, viz., on the 5th day of March, 1882, while, on the other hand, if the payment of the purchase-money was essential to complete the sale, the time for redemption did not expire until the 7th day of July, 1883, being one year from the time the purchase-money was paid. The right of redemption expired at the one time or the other. The court erred in fixing it at the time designated in the judgment, viz., January 20th, 1883. "The right to redeem property sold at sheriff's sale upon an execution or order of sale issued upon ordinary judgments, decrees, or other judicial proceedings within this State, is regulated by statutory law, and, to be made available, must be exercised within one year from the date of sale." *Cummings*

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v. *Pottinger*, 83 Ind. 294. In *Rucker v. Steelman*, 73 Ind. 396, it was held by this court that "The right to redeem is purely a statutory one, and must be asserted in strict conformity to the statute. The right must be exercised within the time and in the manner prescribed, or it is lost." These cases settle the question that the court below possessed no authority or power to limit or extend the time prescribed in the statute for redemption.

The vital question is, when was the sale under consideration consummated? It is settled by the authorities that judicial sales must be for cash. *Chapman v. Harwood*, 8 Blackf. 82 (44 Am. Dec. 736); *Ruckle v. Barbour*, 48 Ind. 274; *McCormick v. Walter A. Wood, etc., Co.*, 72 Ind. 518; *Carnahan v. Yerkes*, 87 Ind. 62; Rorer Judicial Sales, section 729. In *Chapman v. Harwood, supra*, it was said by this court: "Besides, if the sheriff had even conveyed the land without receiving the purchase-money, the conveyance would have been void, because he had no authority to sell except for cash. He is a special agent, and can not exceed the powers which the law gives him." In *Ruckle v. Barbour, supra*, it was held that the payment of the purchase-money constitutes a condition precedent to the power of the sheriff to issue a certificate of purchase, and that a certificate issued without the payment of the purchase-money is void, because the sheriff possesses no power to issue it. And in *Carnahan v. Yerkes, supra*, it was held that it is the payment of the purchase-money that completes the sale. The principle enunciated in these cases is founded on justice, and is supported by reason. They establish, or recognize, a safe and salutary rule, to be applied in cases like this. A purchaser at a sheriff's sale may be insolvent or irresponsible, or he may have no intention of completing his purchase by paying the purchase-money, or he may abandon his intention of consummating the purchase, if such intention existed. To hold, under such circumstances, that the person desiring to redeem must, in order to do so, pay to such purchaser the amount bid, but not paid, by him

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for the property would unjustly operate, in many cases, to the prejudice of the person so redeeming, as he has no assurance that the money paid for redemption will be restored to him in case the purchaser fails to complete his purchase by paying the purchase-money.

We think, and therefore hold, that a sale of real estate by a sheriff upon an execution, or order of sale, can not be regarded as completed or consummated, so far, at least, as the right of redemption is involved, until the purchase-money is fully paid, and that the time allowed by the statute for redemption commences to run from that time and not before. In this case the purchase-money was not fully paid until the 7th day of July, 1882; hence the appellant's right of redemption did not expire until one year from that time. For the error of the court in fixing the time for redemption at an earlier period the judgment must be reversed.

PER CURIAM.—The judgment of the court below is reversed at the costs of the appellee Firestone.

Filed June 19, 1884.

No. 11,409.

BRATTAIN v. CANNADY.

GUARDIAN AND WARD.—*Breach of Duty.—Responsibility of Guardian for Consequence of his Corrupting Female Ward.*—Where a guardian of the person and estate of a minor, a female just entering womanhood, ignorant, chaste, of weak mind, and without living parents, took control of her person and placed her in his family as a servant, and, knowing her to be such a person, took indecent liberties with her person, thereby exciting her passion, telling her that it was not improper for her to permit him to do so, and that the act of sexual intercourse would not injure her, and thereafter, while she still so remained in his family, he, knowing her to be still ignorant and weak-minded, negligently suffered and permitted his son, a well grown lad, to sleep with her and to have sexual intercourse with her, whereby she became pregnant, the guardian is liable to the ward for the injury so suffered by her.

From the Hamilton Circuit Court.

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*D. Moss, R. R. Stephenson and H. A. Lee, for appellant.
A. F. Shirts, G. Shirts and W. R. Fertig, for appellee.*

BLACK, C.—The appellant, Clara E. Brattain, prosecuting her suit as a poor person, brought this action against the appellee. A demurrer to the complaint for want of sufficient facts was sustained. The action was commenced in November, 1883.

The complaint alleged that on the 1st of October, 1881, the plaintiff was only fifteen years of age, in stature small, just verging into womanhood, without father or mother living, chaste, uneducated, utterly ignorant of the meaning of the terms sexual intercourse, and of the fact that pregnancy results from such intercourse, and so feeble in mind as to be unable to discriminate between right and wrong; that at said date the defendant was the duly appointed, qualified and acting guardian of her person and estate, and he had claimed to be acting in that capacity ever since; that shortly after said date he took control of her person, placed her in his family as a servant, and continuously afterward kept her in that position until about four weeks before the commencement of this suit; that on the 1st of December, 1881, the defendant, in violation of his duty as her guardian and master, and well knowing all the facts aforesaid, unlawfully took indecent liberties with her person, at said county, by then and there unlawfully embracing her and handling her private parts to such an extent as to excite her passions; and at the same time he informed her that it was not improper for her to permit his said caresses and to submit to his said embraces; that he continued, almost daily, to take similar liberties with her person, and to repeat to her that such conduct was not improper, and that the act of sexual intercourse would not injure her, during all the time she remained in his service and under his control as aforesaid, well knowing that she still remained ignorant and feeble in mind as aforesaid; that during the last year she so remained in his service, he well know-

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ing all the facts aforesaid, unlawfully, carelessly and negligently suffered and permitted his minor son, a well grown lad of about the age of the plaintiff, to sleep with her, and to repeatedly have sexual intercourse with her, by means of which sexual intercourse she became, and at the time of pleading was pregnant with a bastard child; that after her said pregnancy was advanced about four months, the defendant, well knowing her condition, took her to the residence of a neighbor and left her without a home or any means whatever to provide for her needs, and that, in consequence of her said pregnancy, she had become diseased and was rendered wholly unable to support herself by her labor, or to make any suitable provisions for her lying in and the expenses she would be compelled to incur in becoming the mother of an illegitimate child. "Wherefore the plaintiff says that by means of the unlawful and wrongful acts of the defendant aforesaid, and by reason of the unlawful and wrongful acts he suffered and permitted as aforesaid, she has sustained damage in the sum of \$5,000," for which she demanded judgment.

This is a peculiar case. The improper and indecent acts of the defendant, which the plaintiff permitted, could not render him liable as for assault and battery; and his failure through negligence, to prevent his son from having sexual intercourse with the plaintiff, could not, of itself, render him pecuniarily liable.

The defendant was entitled under the statute, section 2518, R. S. 1881, to have the custody and tuition of the plaintiff. She was bound to submit to his exercise of that right, and she was entitled to his protection. He was bound to care for and to promote her moral, intellectual and physical welfare. Mr. Schouler, in discussing the duties of guardians (Dom. Rel., sec. 336), says: "Guardians, as we have seen, are seldom appointed where there is not some property. But even though the ward be penniless, we are not to suppose that one vested with the full right of custody can neglect with impunity those offices of tenderness which common charity as well as

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parental affection suggests. For to the orphan he stands in some sense in the place of a parent, and supplies that watchfulness, care, and discipline which are essential to the young in the formation of their habits, and of which being deprived altogether, they would better die than live."

For the purpose of deciding the case, we must take the averments of the complaint to be true. Besides being of tender age and innocent, the girl was of weak mind, ignorant and unable to discriminate between right and wrong. Taking advantage of the confidential relation which he sustained to her and of the control which he possessed over her, he corrupted her and prepared her to be an easy victim of the lust of another person in his own household, where he kept her, and of her own passions, which he had excited, and of her ignorance and weak-mindedness, of which he had knowledge. When he had done the acts imputed to him, if they did not of themselves subject him to any pecuniary liability, and only constituted good ground for removing him from the guardianship, they placed upon him a requirement while she remained under his personal control, he knowing that she still continued ignorant and feeble minded, to protect her from the legitimate consequences of his acts and the surroundings in which he kept her.

If the complaint is true, certainly she has suffered grievously, and we can not say upon the whole complaint that her suffering is not the effect of his wrong, but, on the contrary, we think that the complaint sufficiently connects her injury with his breach of duty to make him liable for the damages which she claims. We are unwilling to say that the law affords her no redress but his removal from the guardianship.

We think the demurrer to the complaint should have been overruled.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be reversed, at the costs of the appellee.

Filed April 4, 1884. Petition for a rehearing overruled June 19, 1884.

No. 8028.

BURKAM ET AL. v. BURK ET AL.

DEED.—*Escrow.*—*Mortgage.*—*Pleading.*—*Exhibit.*—Where the owner of an equitable estate executes an instrument to secure a debt without describing the land in it, and at the same time, and as a part of the same transaction, executes a deed containing an accurate description, and leaves it in escrow to be delivered to the other party upon default of payment, in a suit to enforce such lien such deed is a proper exhibit, and the description therein contained will supply the want of one in the other instrument.

NAMES.—*Title.*—A deed while held as an escrow conveys no title.

MORTGAGE.—*Equitable Estate.*—The owner of an equitable estate may mortgage the same, and such estate may be sold upon a foreclosure.

NAMES.—*Foreclosure.*—*Misdescription.*—*Reformation.*—Where a mortgage misdescribes the land, the same may be reformed and foreclosed, notwithstanding the fact that it has already been foreclosed by such mistaken description.

PRACTICE.—*Exception.*—No question is presented by a ruling upon a demurrer unless an exception is saved.

NAMES.—*Judgment.*—*Harmless Error.*—Where it appears affirmatively that the judgment was not rendered upon a given paragraph of a complaint, no available error was committed in overruling a demurrer to such paragraph, though the same was insufficient.

From the Dearborn Circuit Court.

F. Adkinson, G. M. Roberts and W. S. Holman, for appellants.

J. D. Haynes, J. K. Thompson and W. H. Bainbridge, for appellees.

BEST, C.—Rebecca Guard and Timothy, her husband, executed, as was alleged, a mortgage upon the real estate in the complaint described, to James Burk, one of the appellees, and he brought this action against Timothy Guard, the husband, and against various persons as the heirs at law, of Rebecca Guard, who had died intestate, and against James Burkam, one of the appellants, and several other persons as subsequent lien holders, to foreclose said mortgage.

A demurrer to the complaint for the want of facts, by Joseph Burkam and by the other appellants, some of whom are

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children and the others grandchildren of Rebecca Guard, deceased, was overruled.

A demurrer to the fourth paragraph of the cross complaint of the appellant Joseph Burkam was sustained, and a demurrer to the second and third paragraphs of the cross complaint of Edward Hayes was overruled.

Issues were formed, trial had and finding made in favor of the appellee James Burk, against all the defendants, and in favor of Edward Hayes, against all the other defendants. A motion for a new trial by Joseph Burkam was overruled, and judgment was rendered upon the finding.

These several rulings are assigned as error by him, and the other appellants assign as error the ruling upon the demurrer to the complaint.

The complaint averred, in substance, that on and prior to the 20th day of October, 1873, one Sarah E. Hayes was the owner of the land described, and on that day entered into an agreement with said Rebecca Guard and Timothy Guard, her husband, whereby, in consideration of their agreement to pay a certain judgment of \$558, within a specified time, and to pay the costs accrued and to accrue in a certain partition proceeding, and to pay her annually thereafter during her life \$100 on the 3d day of October of each year, and to pay the taxes that should, from time to time, be assessed upon said land, she would execute to said Rebecca a deed of conveyance to be delivered at said Sarah's decease, and she would allow them to occupy and enjoy said real estate and the rents and profits therefrom during her life; that in pursuance of said agreement said Sarah E. Hayes, on the 17th day of December, 1873, executed a deed to them for said premises, and delivered it to one Francis Adkinson to be by him held as an escrow until the death of said Sarah E. Hayes, when it was to be delivered to Rebecca Guard, in the event that she and her husband had then fully complied with their contract; that prior to the 2d day of April, 1874, said judgment of \$558 had been fully paid to said Sarah E.

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Hayes; that the taxes and costs had been fully paid, and that said agreement had been fully kept and performed by them; that on said day said Rebecca Guard and Timothy Guard, her husband, executed to James Burk an instrument in writing to secure the payment of a note of \$1,332 due on the 1st day of April, 1875, which he then held against said Timothy Guard, and stipulated that if said sum, as well as certain costs which he was authorized to pay, should not then be repaid, their title to said premises should become absolute in said Burk, and he should be entitled to be subrogated to all their rights under their contract with and by virtue of their deed from said Sarah E. Hayes, and for the purpose of fully investing said Burk with their title in case said debt should not be paid, they, at the same time and as a part of said contract, executed a deed to him for said land and placed it in the hands of N. S. Given, to be by him delivered to said Burk upon the death of said Sarah E. Hayes, upon condition that the debt should not then be paid. It was further averred that the debt had matured and remained unpaid; that costs and taxes had been paid and not refunded, etc.

The first objection made to the complaint is that the land upon which the mortgage is sought to be foreclosed is not described. No description is found in the body of the complaint, but the deed made by the mortgagors contains a description, and a copy of this deed accompanies the complaint, and is made a part of it. It is insisted, however, that this copy is not a proper exhibit, and that it can not, therefore, supply the description. This depends upon its nature, and the character of the suit. The fact that it was placed in escrow, and that no title can be deduced through it until delivery renders the question exceedingly doubtful. It is certain that alone it does not constitute the foundation of the action. It was, however, as it averred, executed at the same time and as a part of the contract creating the lien the appellee seeks to enforce, and this fact, as it seems to us, renders it a proper, if not a necessary, exhibit in connection with the contract, a

copy of which was also filed. At all events the question is doubtful, and as the objection does not affect the substantial merits of the controversy, we do not think the complaint should be deemed insufficient for such reason.

The next objection urged by Joseph Burkam is that the complaint shows that Rebecca Guard had no title which she could mortgage. It is assumed that she could not mortgage the land until she acquired the legal title, and as this had not been done her mortgage created no lien.

The deed of Sarah E. Hayes was in escrow, and until delivery conferred no title. This is well settled. *Koons v. Ferguson*, 25 Ind. 388; *Berry v. Anderson*, 22 Ind. 36.

It does not, therefore, follow that she had no interest in the land which she could mortgage. By her purchase she became the owner, and while she was not invested with the legal title, she was with an equitable estate, and this was the subject of mortgage. *Westfall v. Stark*, 24 Ind. 377; *Calvert v. Landgraf*, 34 Ind. 388; *Bibbler v. Walker*, 69 Ind. 362.

The fact that the purchase-money had not been fully paid does not affect the character of her estate, but only the extent of her interest. This, under her contract of purchase, however small, was an equitable interest, and such interest is subject to mortgage, as before stated. This objection, therefore, can not prevail.

It is also insisted that such interest as she acquired by her purchase is not subject to sale upon an execution. This may be conceded, and yet it does not follow that the court possessed no power to order such interest sold. We think its authority to make the order can not be successfully questioned. This disposes of all the objections to the complaint, and as neither of them is well taken, it must be deemed sufficient.

The appellant Joseph Burkam next insists that the court erred in sustaining a demurrer to the fourth paragraph of his cross complaint. The record fails to show that an exception

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was reserved to this ruling, and hence no question is presented by it in this court. *King v. Summitt*, 73 Ind. 312 (38 Am. R. 145).

The next assignment is that the court erred in overruling the demurrer to the second and third paragraphs of the cross complaint of Edward Hayes. The record shows affirmatively that the judgment rendered in favor of Edward Hayes was not based upon the second paragraph of his cross complaint, and it therefore follows that he was not injured by such ruling, if erroneous. As an error of such character will not work a reversal of the judgment, we will not examine the pleading. *Olds v. Moderwell*, 87 Ind. 582.

The third paragraph of Edward Hayes' cross complaint alleged that he held a mortgage upon a portion of the premises in dispute, which was prior to any lien or claim of appellant Burkam and the other parties to said action; that said mortgage misdescribed said land; that it was foreclosed and sold to him by such misdescription; that all the parties had full notice of such mistake in the description of the premises when they acquired their respective liens. Prayer for a reformation and foreclosure of the mortgage.

This paragraph was sufficient. Such mortgages may be reformed and foreclosed notwithstanding a previous foreclosure by such mistaken and erroneous description. This has several times been decided by this court. *Conyers v. Mericles*, 75 Ind. 443; *Jones v. Sweet*, 77 Ind. 187; *Sanders v. Farrell*, 83 Ind. 28. There was, therefore, no error in this ruling.

The ruling upon the motion for a new trial is not urged as error, and, therefore, will not be further noticed.

This disposes of all the questions in the record, and as we are of opinion that no error has intervened, the judgment should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby affirmed in all things, at the appellants' costs.

Filed June 19, 1884.

Whipperman v. Smith *et al.*

No. 10,671.

• WHIPPERMAN v. SMITH ET AL.

MORTGAGE.—Construction of Contract.—Assignment of Certificate of Stock in Building Association.—A mortgage “to secure the payment, when the same becomes due, of three shares in the M. Loan, etc., Association” (which had been assigned by the mortgagor to the mortgagee), “in value, when the same matures, of \$600. The mortgagor agrees to pay promptly to the association all dues on said shares; that upon his failure to do so the mortgagee may foreclose, as a part of the purchase-money, for all dues necessary to complete said shares to make them par. This mortgage is to secure the purchase-money for the property herein described, and the mortgagor agrees to pay said sum above secured,” secures only the payment of the dues necessary to secure to the mortgagee the shares assigned to him, and not the payment of \$600 by the association upon maturity of the stock.

From the White Circuit Court.

J. M. Justice, for appellant.

M. M. Sill, T. F. Palmer, A. W. Reynolds and E. B. Sellers, v. for appellees.

ELLIOTT, C. J.—The appellee Jacob C. Smith was the owner of three shares of stock in the Monticello Loan, Saving Fund and Building Association, and assigned them to James M. Justice, by whom they were assigned to the appellant. The assignments are to the following tenor and effect:

“For value received I hereby sell, transfer and assign to J. M. Justice the share of stock within named, and authorize the secretary to make the necessary transfer on the books of the company. Witness my hand and seal this 11th day of May, 1877.

J. C. SMITH.

“E. B. SELLERS, Secretary.

“For value received I hereby sell, transfer and assign to Henry Whipperman the share of stock mentioned, and authorize the secretary to make the necessary transfer on the books of the company. Witness my hand and seal this 25th day of January, 1878.

JAMES M. JUSTICE.

“Attest: E. B. SELLERS, Secretary.”

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There is a separate assignment of each of the three shares, but they are all alike, and in setting out one we show the legal tenor and effect of all. The certificates were assigned to Justice in payment of the purchase-money of real estate sold by him to the appellee. At the time the sale was made and certificates assigned, the appellees executed the following mortgage:

"This indenture witnesseth, that Jacob C. Smith, of White county, in the State of Indiana, mortgages and warrants to J. M. Justice, of Cass county, in the State of Indiana, the following real estate in White county, in the State of Indiana, to wit: Four (4) feet off of the north side of lot No. four (4) in the original plat of the town of Monticello; also sixteen (16) feet off of the south side of lot No. three (3) in the original plat of the town of Monticello, to secure the payment, when the same become due, of three shares in the Monticello Loan, Saving Fund and Building Association, Nos. 375, 376 and 377, in value when the same matures of six hundred dollars. The mortgagor expressly agrees to keep paid up promptly all dues on said three shares assigned to the mortgagee herein, coming to the association; that upon his failure so to do said mortgagee shall have the right to foreclose as a part of the purchase-money for all dues necessary to complete said three shares to make them par. That this mortgage is given to secure the purchase-money for property herein described, and the mortgagor expressly agrees to pay said sum above secured without relief from valuation and appraisement laws. In witness whereof the mortgagors have hereunto set their hands and seals this 23d day of April, 1877.

"JACOB C. SMITH.

"EUPHEMIA SMITH."

These instruments are set forth in the complaint of the appellant, and it is averred that this plaintiff received on share No. 375 the sum of one hundred and fifty dollars; that there is still due on said three shares seven hundred dollars which is wholly unpaid. Plaintiff further avers that said Monticello

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Loan, Saving Fund and Building Association, was on the 1st day of January, 1880, when all shares of said association became due, openly and notoriously insolvent, and has ever since been unable to pay any part of said claims now due.

Copies of the certificates of stock are also set forth in the complaint, and there is no promise in them to pay any sum of money; they simply recite that the holder is entitled to a designated share of the capital stock of the association. All that the certificates assume to vest in the person to whom they were issued is the right of a stockholder of the association; there is no undertaking to pay money, nor is there any promise that such rights shall be of any value. No action, therefore, can be founded on them, except to vindicate the rights of a stockholder, or to recover such benefits as a stockholder is entitled to under the statute, articles of association and by-laws of the corporation. A certificate of stock does not carry with it a contract or promise to pay money. It simply invests the holder with the rights of a corporator. If, then, the appellant secured the rights of a stockholder, he obtained all that the certificates assumed to confer, and there was no breach of the provision of the mortgage which secures to him the stock, and this is really the intention of that instrument.

The assignment of a certificate of stock is not like the endorsement of a promissory note or bill of exchange, and there is no liability upon such an assignment. The effect of the assignment of stock in a corporation is to transfer title and not to bind the assignor to any personal liability. If, therefore, the appellant has any right of action, it must be by virtue of the covenants of the mortgage, for none is created by the assignment of the certificates.

The question whether the complaint does or does not state a cause of action depends upon the meaning of the provisions of the mortgage. If the promise in the mortgage is to be construed as an undertaking to pay the whole amount of the certificates, then a cause of action is stated, but if it is to be construed as an undertaking to pay the dues, so as to secure to

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the holder the benefit of the stock, then no cause of action is stated.

There is, as appellant asserts, an essential difference between a mortgage containing a promise to pay the debt and one not containing such a covenant. *Buell v. Shuman*, 28 Ind. 464; *Griner v. Butler*, 61 Ind. 362 (28 Am. R. 675); *Gundel v. Cue*, 72 Ind. 34; *Sperry v. Dickinson*, 82 Ind. 132; *Bodkin v. Merit*, 86 Ind. 560; *Loehr v. Colborn*, 92 Ind. 24. There is in the mortgage before us such a promise, and the question is, what is the debt which the mortgagors agreed to pay? They are bound only by the promise in the mortgage, and not by the assignment of the certificates, for we can not extend the effect of the covenant beyond the fair and ordinary meaning of the language in which it is expressed.

There is no promise in the mortgage to pay the amount of the certificates, nor is there any promise to pay the purchase-money of the land. The promise is to pay all dues and is contained in these words: "The mortgagor expressly agrees to keep paid up promptly all dues on said three shares assigned to the mortgagee herein, coming to the association; that upon his failure so to do said mortgagee shall have a right to foreclose, as a part of the purchase-money, for all dues necessary to complete said three shares and make them par." This is the principal promise in the mortgage; it is this which expresses what the mortgagor's undertaking is, and as one thing is definitely expressed, none other can be implied. The express statement that the mortgagors shall pay such dues as shall keep the stock at its face value excludes the inference that they are bound to do some other thing. The principal promise is not to pay money to the mortgagee, nor to pay the certificates of stock, but to pay such dues as may be necessary to keep the stock in force. The legal effect of the promise is, that the mortgagor shall not allow the dues to become in arrears and by such a default cause the loss of the stock to the mortgagee. The covenant which follows the promise we have set forth binds the mortgagors to perform that promise.

The State, *ex rel.* McGregor, v. Cooprider, Trustee.

It does not bind them to do something not before mentioned in the mortgage. The reference is to a promise or debt previously set forth in the mortgage, for the words are "and the mortgagor expressly agrees to pay the sum above secured," and the only sum mentioned or referred to is the sum sufficient to keep all dues paid. There is no other debt, promise, or undertaking to which it could possibly refer. It seems perfectly clear that the only default which will entitle the appellant to foreclose the mortgage is a breach of the promise to keep the dues paid.

It is plain that, as there is but one principal promise or undertaking secured by the mortgage, the covenant "to pay the sum above secured" can only refer to the one main promise or undertaking, and when we consider the character of the stock and the law under which the building association was organized, the question becomes even easier of solution. It is evident that the transaction was simply this, that the mortgagee should take the stock for his real estate, and that the mortgagor should keep the dues paid, and, as the only agreement of the mortgagor was to keep the dues paid, this was the only agreement which the mortgage was intended to secure.

Judgment affirmed.

Filed June 18, 1884.

No. 11,268.

THE STATE, EX REL. MCGREGOR, v. COOPRIDER, TRUSTEE.

SCHOOL TOWNSHIP.—*Duty of Trustee.—Mandate.*—It is the duty of the trustee of a school township to apply the tuition funds of the township, when received, to the payment of its indebtedness for tuition, and the performance of such duty by the proper trustee may be enforced by writ of mandate.

From the Clay Circuit Court.

S. M. McGregor, I. M. Compton, G. A. Knight and C. H. Knight, for appellant.

C. F. McNutt, E. S. Holliday and G. A. Byrd, for appellee.

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The State, *ex rel.* McGregor, v. Cooprider, Trustee.

Howk, J.—Upon the verified application of the appellant's relator, William W. McGregor, an alternative writ of mandate was issued in this cause, directed to the appellee, Cooprider, trustee of Harrison School Township. The appellee appeared and demurred to each of the two paragraphs of the alternative writ, upon the ground that it did not state facts sufficient to constitute a cause of action, or to entitle the relator to a peremptory writ of mandate. This demurrer was sustained by the court to each of such paragraphs, and to these rulings the relator excepted, and, declining to amend, judgment was rendered against him for appellee's costs.

Error is assigned here which calls in question the decision of the circuit court in sustaining the appellee's demurrer to each paragraph of the alternative writ of mandate.

In the first paragraph the relator alleged that on the 26th day of March, 1883, he recovered a judgment against said Harrison School Township in the sum of \$697.75 for services he had rendered such township in teaching school, and in the further sum of \$119.45 for costs of suit; that such judgment was still in full force, unreversed and wholly unpaid; that the appellee, Cooprider, was the duly elected, qualified and acting trustee of said Harrison School Township, and he then had in his possession, as such trustee, funds of such township for tuition, to wit, the sum of \$2,239.91, out of which he might pay the relator's judgment; that as such officer, having the necessary and appropriate money on hand with which to pay off and satisfy the relator's judgment, it was the appellee's duty to do so; and that, although the relator had made demand of the appellee, since the said sum of money came into his hands, to pay off and satisfy the relator's judgment, yet he, the appellee, had failed and refused so to do; and the relator further averred that he had no adequate legal remedy by which he could enforce the collection of his judgment, other than by the writ of mandate.

In the second paragraph of the alternative writ the relator alleged that on the 26th day of March, 1883, he recovered a

The State, ex rel. McGregor, v. Coopridier, Trustee.

judgment against said Harrison School Township, in the court below, for the sum of \$697.75, for services he had rendered such township in teaching school in the years 1869, 1870, 1871 and 1872, under the administration of one Robert Dalton, who was, during those years, the duly elected, qualified and acting trustee of said township; that in each of the years named the relator taught a term of school, and for each of the said terms he was to receive the sum of \$200; that the relator received no part of the several sums of money so earned by him in teaching the said terms of school for said township, but recovered the aforesaid judgment therefor, which said judgment remains in full force, unreversed and wholly unpaid; that the said Robert Dalton, as the trustee of said township during the said years, became a defaulter and had squandered and misappropriated large sums of money belonging to the different funds of said township during his term of office; that afterwards one Peter Barrick, as the successor in office of said Dalton, in a suit on his official bond, recovered a judgment against him and his sureties, in the court below, on the 19th day of June, 1873, in the sum of \$2,086.75, the amount then due the said township for the various funds from the said Dalton, as such trustee; that in said judgment there was included the sum of \$836.38, belonging to the common school fund of said township, which has been misappropriated and squandered by said Dalton as aforesaid; that the said judgment, so recovered by the said Barrick, as trustee, against the said Dalton and his sureties, had been collected and paid over in full to the trustees of such township; that after the said funds were so collected on said judgment, the relator made demand upon the said Barrick, trustee as aforesaid, and upon each of his successors in office thereafter, into whose hands the money so collected on such judgment came, for the payment of the money so due him.

And the relator averred that the said fund so collected on said judgment, and belonging to the common school fund, was the fund out of which he should be paid; that the appellee,

The State, *ex rel.* McGregor, v. Cooprider, Trustee.

Cooprider, was the duly elected, qualified and acting trustee of said Harrison School Township, and that he then had in his possession, as such trustee, common school and tuition funds of said township, out of which he might and should pay the relator's said judgment against the said school township, the amount of such funds in his hands being \$2,239.81; that as such officer, having the necessary and appropriate money on hand with which to pay off and satisfy the relator's judgment, it was the appellee's duty so to do; that, although the relator had made demand of the appellee, since the said funds came into his hands, to pay off and satisfy his said judgment, yet he, the appellee, had failed and refused so to do; that the relator, on the — day of —, 1883, caused an execution to be issued on his said judgment, and placed the same in the hands of the sheriff of Clay county, who afterwards, on the — day of —, 1883, returned the same for the reason that there was no property found upon which to levy; and the relator averred that he had no adequate legal remedy by which he could enforce the collection of his said judgment other than by writ of mandate. Wherefore, etc.

We are of opinion that the court clearly erred in sustaining the appellee's demurrer to each paragraph of the alternative writ of mandate. It was shown by the relator, in each paragraph of the alternative writ, that he had established the validity of his claim against Harrison School Township, of which township the appellee was the trustee, by the judgment of a court of competent jurisdiction as well of the subject-matter as of the parties, which judgment was in full force and wholly unpaid; and that the appellee, as the trustee of the township, upon the relator's demand of the money due on his said judgment, had failed and refused to make payment thereof. If the relator's showing had gone no farther than this, each paragraph of the writ would have been sufficient to withstand the appellee's demurrer thereto for the want of facts, and to have required him to make his return or answer to such writ. But the relator went further and showed,

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in each paragraph of the writ, that the appellee, as trustee, had in his possession tuition funds of the township, out of which the relator's judgment ought to and must be paid, more than sufficient to pay the entire amount due thereon. If the facts stated in each paragraph of the writ are true, and, as the case is now presented, their truth is admitted, the relator is clearly entitled to a peremptory mandate requiring the trustee of the township to pay off and satisfy his said judgment out of the tuition funds of the township, no matter when, nor from whom, such funds were received by such trustee. It can not be said that such payment would be, in any proper sense, a diversion of the tuition fund of the township from the purpose to which, under our State Constitution, such fund "shall be inviolably appropriated." This point is settled by this court in *Trustees of Town of Milford v. Simpson*, 11 Ind. 520, which was an appeal from a judgment directing the application of the school fund of the town in the county treasury to the payment of a judgment which Simpson had previously recovered against such town, for his services as a teacher of common schools, under the employment of the town trustees. The court there said: "The point made is, that the order of the court diverted the school fund from its intended purpose; that the fund should be applied to the purposes of free schools. We are of opinion that the order of the court applied the fund to the precise purpose for which it was intended. The appellee's judgment was recovered 'for services as a teacher of common schools,' under the employment of the trustees."

A school corporation must pay its debts just as any other corporation. If, from any cause, a school township shall become indebted to any one for past tuition, it seems to us that any tuition funds of such township, then on hand or thereafter received, would be applicable to the payment of its past due indebtedness for tuition purposes; and that it would be the duty of the trustee of such township to apply such funds, when received, to the payment of any such past indebtedness.

Hayes v. The State, *ex rel.* Murray.

Where such official duty exists, we need not argue for the purpose of showing that the performance of such duty, by the proper officer charged therewith, may be enforced by writ of mandate. This is the provision of the civil code (section 1168, R. S. 1881), as construed in many decisions of this court. *Board, etc., v. State, ex rel.*, 61 Ind. 379; *Jessup v. Carey*, 61 Ind. 584; *Smith v. Johnson*, 69 Ind. 55; *Duke v. Beeson*, 79 Ind. 24; *Gardner v. Haney*, 86 Ind. 17.

The judgment is reversed, with costs, and the cause is remanded with instructions to overrule the demurrer to each paragraph of the alternative writ of mandate, and for further proceedings not inconsistent with this opinion.

Filed June 18, 1884.

No. 10,841.

HAYES v. THE STATE, EX REL. MURRAY.

DRAINAGE.—*Notice to Pay Assessment.*—*Publication of.*—*Evidence.*—A single publication of a proper notice to pay an assessment for drainage, made in a newspaper of the county thirty days before the time fixed for payment, is a compliance with section 4277, R. S. 1881, and is sufficient as to time; but proof that "a notice was sent to the land-owner by mail," without evidence of the time when or place where it was sent, or the contents of the notice, is not sufficient.

From the Grant Circuit Court.

G. W. Harvey, for appellant.

J. L. Custer, for appellee.

BICKNELL, C. C.—This was a suit by the appellee to recover assessments for benefits under the drainage act. R. S. 1881, chapter 49.

The defendant's answer was the general denial.

There was a finding by the court for the plaintiff for \$35.60. The defendant's motion for a new trial was overruled, and judgment was rendered on the finding.

The defendant appealed. The error assigned is overrul-

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ing the motion for a new trial. The reasons for a new trial are, that the finding is not supported by sufficient evidence, and is contrary to law and to the evidence.

The appellee moves to dismiss the appeal for a defect in the assignment of errors and for want of notice of the appeal, but the appellant, under leave of the court, having amended his assignment of errors and given proper notice, the motion to dismiss the appeal is overruled.

The appellant claims that the evidence fails to show notice requiring payment of the assessment.

Section 4277, R. S. 1881, provides that "The commissioner charged with the execution of the work, * * * shall assess from time to time upon the lands benefited, ratably upon the amount of benefits as adjudged by the court, such sums of money as may be necessary therefor, not exceeding the whole benefits so adjudged upon any one tract; and he may require the same to be paid in instalments, not exceeding twenty per cent. per month, at such times as he shall fix after thirty days notice thereof, to be given by personal notice to the owner of such land, or by one publication in a newspaper published in each of the counties in which the lands benefited are situated, stating when and where such payment shall be made."

It appeared in evidence that the lands affected by the drainage were all in Grant county, and that the amount assessed against the appellant was \$128, and that twenty per cent. thereof, together with an attorney's fee of \$10, amounted to \$35.60, the sum for which the judgment was rendered.

The appellee undertook to prove personal notice and also publication; he was not required to do both; the appellant claims that neither was sufficient.

As to personal notice, the only evidence is the following testimony of the drainage commissioner:

"I sent the defendant a notice by mail; don't remember that I saw Hayes and talked with him about it."

Hayes v. The State, *ex rel.* Murray.

This was insufficient; it does not show what the notice was, nor when it was sent, nor to what postoffice it was sent.

As to the publication, the commissioner thus testified:

"I gave notice of the assessment by advertising," and the following notice and proof of publication were introduced in evidence:

"ORDER TO PAY ASSESSMENTS.

"All persons having land assessed with benefits for the construction of the 'Tippey Ditch,' situate in VanBuren, Monroe and Center townships, are hereby required to pay me, at the auditor's office in Marion, Indiana, on November 7th, 1881, twenty (20) per cent. of said assessed benefits, the same being necessary for the construction of said ditch by me as ordered by the circuit court. ELIAS C. MURRAY,

"Oct. 6th, 1881. Drainage Commissioner."

"STATE OF INDIANA, GRANT COUNTY, ss:

"Personally appeared before me John Q. Brownlee, one of the publishers of the Marion Chronicle, a weekly newspaper of general circulation, printed and published in Marion, Grant county, Indiana, who, being duly sworn, upon his oath says, that the attached notice was duly published in said paper for one week, which publication was on the 6th day of October, 1881. JOHN Q. BROWNLEE.

"Subscribed and sworn to before me this 8th day of May, 1882. JOHN H. ZAHN, Clerk."

We think this was sufficient proof of publication. Section 4280, R. S. 1881, declares that "This act shall be liberally construed to promote the drainage and reclamation of wet or overflowed lands."

The appellant claims that the notice for thirty days should be counted from the end of a week after its first publication, but the statute is satisfied if one publication has been made thirty days before the day appointed for payment. In this case there were thirty days between the day of the publication and the day fixed for the payment.

The appellant claims also that there was no ratable assess-

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ment "upon the amount of benefits as adjudged by the court." The evidence shows that the assessments were duly made and approved by the court.

The commissioner testified on this point as follows: "I levied twenty per cent. for the construction of the ditch on the entire assessment of benefits, and each one thereof; it was necessary."

It appeared on the cross-examination of said commissioner that he did not collect the assessments from all of the parties assessed, but took notes from some of them, and agreed that they need not pay until the work should be completed up to their lands. But this action of the commissioner, even if invalid, had no effect upon the ratable assessment. The failure of the commissioner to collect from some is no defence for others, and does not invalidate the ratable assessment.

There was evidence tending to support the finding; therefore it can not be disturbed. There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed June 21, 1884.

No. 11,546.

BERRY v. NICHOLS.

EXECUTION.—Exemption.—Injunction.—Pleading.—Practice.—A complaint by A. against a sheriff, showing a judgment against B. before a justice of the peace, the filing of a transcript making a lien on land of the debtor, a subsequent conveyance of the land to A., the issue of execution to the sheriff which was levied on the land, notwithstanding a proper claim by schedule of the exemption of the land from execution, its return without sale and the issue of a *renditioni exponas*, without *præcipe*, upon which the sheriff was about to sell the land, and praying an injunction, is bad as a complaint, but good as a motion to set aside the *rendi.* for irregularity, and there is no error in overruling a demurrer to it.

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SAME.—*Judgment.*—A judgment on such a complaint, perpetually enjoining the sale and relieving the land of the lien, is not authorized, and a motion to modify it so as merely to enjoin a sale under the *vendi.* should be sustained.

From the Sullivan Circuit Court.

J. T. Hays and H. J. Hays, for appellant.

J. C. Briggs and C. E. Barrett, for appellee.

HAMMOND, J.—This was an action by the appellee against the appellant, as sheriff of Sullivan county, to enjoin the sale of real estate under a *venditioni exponas*, issued upon a judgment in favor of Porter Burks against Elizabeth Boon. The appellant's demurrer to the complaint was overruled. He declined to answer, and judgment was rendered in favor of the appellee, perpetually enjoining a sale of the real estate under the judgment, and declaring it released from the lien thereof. The appellant moved the court to so modify the judgment as merely to enjoin a sale of the real estate under the writ under which the appellant was proceeding to sell when this action was commenced. This motion was overruled.

The material facts stated in the complaint were as follows: On November 17th, 1880, Burks filed in the office of the clerk of Sullivan county a transcript of a judgment obtained in his favor before a justice of the peace against Elizabeth Boon, and which, by the filing of such transcript, became a lien upon the real estate in controversy, the same at that time being owned by said Elizabeth Boon. By subsequent conveyances by warranty deeds from Elizabeth Boon and others deriving title from her, the title to the land vested in the appellee, subject to the lien of said judgment. After the appellee became the owner of the land, an execution issued on said judgment, and was placed in the hands of the appellant as sheriff. Elizabeth Boon, by proper inventory of her property, including the real estate in controversy, and by proper affidavit, demanded of the appellant, as such sheriff, the exemption of such real estate from sale under said execution.

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It is averred that said real estate and all other property then owned by Elizabeth Boon were of less value than \$300. The appellant denied her right to exemption and levied the execution upon the real estate. He returned the execution unsatisfied without a sale of the property, whereupon, without any *præcipe*, the clerk issued a *venditioni exponas*, under which the appellant, as sheriff, was proceeding to sell the real estate when this action was commenced. There is no averment in the complaint that the judgment was rendered upon a debt growing out of contract, express or implied.

The appellant claims that Elizabeth Boon was not entitled to exemption, as she had parted with the title to the real estate before the issue of execution.

Section 1 of an act of 1852, which governed the present case, provided "That an amount of property not exceeding in value three hundred dollars, owned by any resident householder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of, or founded upon a contract, express or implied, after the fourth of July, one thousand eight hundred and fifty-two." 2 R. S. 1876, p. 353.

A proper construction of this statute makes it apply, we think, to any property owned by the judgment debtor to which the lien of the judgment, or an execution issued under it, attaches while such property is so owned by him, whether it be afterward conveyed or not. Thus interpreted, the statute allowed Elizabeth Boon to protect herself from the covenants of her deed by claiming the exemption so as to prevent the sale of the property, the same as if it had not been conveyed after the lien of the judgment attached to it.

The appellant refers to *Holman v. Martin*, 12 Ind. 553, and *Thompson v. Ross*, 87 Ind. 156. In the former case the real estate had never been in the name of the judgment debtor, and he never claimed to own it. In the latter case there was a failure of evidence to show that the execution defendant

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ever owned the property. It was held in each case that the facts did not show a right of exemption. Those cases were quite different from the present, and the decisions therein do not conflict with what we now hold to be the law.

The cases of *Vandibur v. Love*, 10 Ind. 54, and *Godman v. Smith*, 17 Ind. 152, strongly support Elizabeth Boon's right of exemption, provided the appellee's complaint had shown that the judgment was such as authorized an exemption of property levied upon to be sold for its satisfaction. But in this respect the appellee's complaint was defective. It should have averred that the judgment was rendered upon a debt growing out of contract, express or implied, for if it grew out of tort, the exemption was not allowable. *State, ex rel., v. Melogue*, 9 Ind. 196; *Keller v. McMahan*, 77 Ind. 62; *Thompson v. Ross, supra*. In the absence of a showing to the contrary, it must be presumed that the officer properly performed his duty, and that he rightly refused the exemption.

A *venditioni exponas* can issue only when directed by the judgment plaintiff. Section 741, R. S. 1881. And this direction must be by written *præcipe*. Section 678, R. S. 1881. Where an execution issues without such *præcipe*, it is irregular, and may be set aside on motion. 2 Works Pr., section 1142. As the complaint averred that the writ, under which the appellant was proceeding to sell, issued without a *præcipe*, it was good as a motion to set the writ aside, and there was no error, therefore, in overruling the demurrer. But the complaint was not sufficient to authorize a decree perpetually enjoining a sale of the real estate under the judgment, nor to release such real estate from the lien of the judgment. The appellant's motion to modify the decree should have been sustained.

The judgment is reversed, at appellee's costs, with instruction to the court below to modify the decree in accordance with appellant's motion.

Filed June 18, 1884.

 Locke v. Catlett et al.

No. 11,325.

LOCKE v. CATLETT ET AL.

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TAXES.—*Sale of Land for.*—*Quieting Title.*—*Complaint.*—*Lien of Purchaser.*—*Deed.*—*Recitals.*—*Exhibit.*—*Personal Property.*—A complaint by a purchaser at a sale of lands for taxes under the act of 1872, to quiet his title or enforce a lien for the taxes paid, which undertakes to state the particulars of his title, is bad to quiet title unless it aver compliance with every requirement of the law required to make a valid sale, but it is good to enforce the lien unless the sale is void for the reasons enumerated in section 255, 1 R. S. 1876, p. 128, and so, also, if the tax deed be made part of the complaint, if the deed do not recite that personal property of the land-owner could not be found, or had been exhausted.

From the Superior Court of Vanderburgh County.

A. Iglehart, J. E. Iglehart and E. Taylor, for appellants.

A. C. Turner, W. W. Ireland, C. Denby and D. B. Kummer, for appellees.

BICKNELL, C. C.—The appellant filed a complaint against the appellees to quiet his title to land in Evansville, which he had purchased from the county auditor at private sale for taxes, or else to enforce the plaintiff's lien upon said land for the money paid by him.

The first paragraph of the complaint alleged a purchase from the auditor at private sale for \$246.71, of land previously offered at public sale by the county treasurer for taxes due and unpaid, but unsold for want of bidders, having become delinquent for the taxes from 1872 to 1879 inclusively, amounting to \$216.71; that said sale was made in conformity to law, and that plaintiff took a certificate of his purchase; that the time of redemption having expired, and said land not being redeemed, the county auditor, on September 30th, 1882, made plaintiff a deed for the land, which was duly recorded; that plaintiff afterwards paid the taxes on said land for 1880 and 1881, in all \$40.29.

The second paragraph of complaint alleged that the land was duly entered for taxation in the names of the appellees,

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and taxes were duly levied thereon for each of the years from 1872 to 1879, inclusively, and were returned delinquent for each of said years, not having been paid; that the land was duly offered at public sale by the county treasurer each year, due notice thereof having been given at the proper time and place, for the taxes, penalty, interest and costs, accruing for each current year, and the delinquent taxes for previous years, and was not sold for want of bidders, and that on the 9th of February, 1880, at the court-house door of the county, due notice having been given for the delinquent taxes thereon due, together with interest, penalty, costs and charges for the year 1879 and said previous years, and said land not being sold for want of bidders, the same was, on September 13th, 1880, duly sold by said auditor at private sale, pursuant to section 247 of the act of the General Assembly of Indiana, approved December 21st, 1872, to this plaintiff, for \$246.71, that being the amount of taxes, penalty, interest and costs then due; that plaintiff paid said sum to the county auditor and took from him a certificate of purchase; that the time for redemption having expired, and said land not having been redeemed, said auditor, on September 30th, 1882, made plaintiff a deed for the land. This paragraph sets out a copy of the deed, which is in the form prescribed by the statute for deeds to be made on public sales, except that it states a private sale instead of a public one, and recites that "the land, having been previously offered at public sale, to wit, on the 9th day of February, 1880, and having failed to sell for want of bidders, was thereby forfeited to the State of Indiana, legal publication having been made of the sale of said lands on the said 9th day of February, 1880, and none of the clauses of the 154th section of chapter 6, R. S. 1852, applying to said land."

This paragraph states that said deed was dated and acknowledged on September 30th, 1882, and was duly recorded, and that the plaintiff thereby became the owner of the land, but that defendants have possession and refuse to recognize his

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title; that plaintiff has paid \$40.29 for the taxes of 1880 and 1881, and that no part thereof has been refunded to him. Wherefore plaintiff prays that if not entitled to the possession of the land he may have judgment for the principal, interest and penalty of the sums so paid by him, to wit, for \$1,000, and that the same be declared a lien, etc.

The only difference in the prayer of these paragraphs is, that in the first paragraph there is a demand that the title be quieted. The defendants demurred jointly and severally to each paragraph of the complaint, and these demurrers were sustained. The plaintiff declined to amend the complaint, and judgment was rendered against him on the demurrers. He appealed. The error assigned is sustaining said demurrers. The claim of the appellant to be quieted in his title is founded upon sections 235 and 236, 1 R. S. 1876, p. 125, and sections 247, 248 and 249, 1 R. S. 1876, p. 127.

Section 235 provides that "In case sales of any land for taxes shall not be perfected for want of bidders, the same shall be considered forfeited to the State, to be disposed of as may be provided by law; and until so disposed of or redeemed shall be continued on the duplicate, charged with all arrearages for which it was so forfeited, and interest; and shall be annually assessed and charged with all accruing taxes, penalties and interest, as other lands."

Section 236 provides that "Such lands shall be annually offered for sale, and on the same terms as other delinquent lands; and until sold for the amount of all arrearages may be redeemed," etc.

Section 247 is as follows: "Any forfeited or unsold tax land may be purchased at private sale, upon application therefor to the proper county auditor, and upon paying to the county treasurer, on the certificate of the county auditor, the amount for which the same was or should have been first offered, with interest upon said amount at ten per cent. per annum, to be computed from the date at which said land was

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or should have been so offered to the time of making such application and payment."

Section 248. "Upon application and payment being made as above provided, the auditor shall execute to such purchaser a certificate conveying the same interest in and to said lands as would be acquired by virtue of an original public sale, as herein provided."

Section 249: "All the provisions of laws relative to the execution of deeds for land sold at public sale shall be applicable to lands sold at private sale pursuant to the provisions of this act: *Provided*, That no deed shall be made until after the expiration of two years from the time when such land was or should have been offered at public sale."

It is claimed that these provisions for a private sale of land for taxes are unconstitutional. See the Constitution of the United States, 14th amendment, section 1; R. S. 1881, section 1143; Cooley Tax. 339. These statutes had a short existence. They were enacted in 1872, and are not in the revision of 1881.

The constitutional question above suggested is discussed by the parties in their briefs, but need not be decided here, because it is immaterial so far as the present case is concerned.

So far as the complaint seeks to quiet title it is insufficient. It undertakes to set out the particulars of the plaintiff's title, and fails to state anything as to personal property.

A party, alleging title under a sale of land for taxes, must show that every provision of the statute has been complied with, and especially he must show either that there was no personal property of the owner, or that such property had been exhausted. *Ellis v. Kenyon*, 25 Ind. 134; *Smith v. Kyler*, 74 Ind. 575; *McWhinney v. Brinker*, 64 Ind. 360.

Ordinarily, this is matter of evidence, but where, in such a case, the plaintiff undertakes to state the particulars of his title in his complaint, the pleading will be defective if any of the material steps are omitted. *Keepfer v. Force*, 86 Ind. 81. It is not sufficient to state that the sale was duly made; that

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is a conclusion of law. The first paragraph of the complaint is also insufficient as to the claim for quieting title, because it fails to allege that the defendants make any claim to the title or the possession. *Nutter v. Fouch*, 86 Ind. 451.

In the second paragraph of the complaint the tax deed is incorporated. "Such deed shall be *prima facie* evidence of the regularity of the sale of the premises described in the deed, and of the regularity of all prior proceedings, and *prima facie* evidence of a good and valid title in fee simple in the grantee." R. S. 1881, section 6480.

The deed contains no recital as to personal property. It has been repeatedly held that unless the tax deed shows that personal property of the land-owner could not be found or was exhausted, it alone does not show title. *Ward v. Montgomery*, 57 Ind. 276; *Steeple v. Downing*, 60 Ind. 478; *Farrar v. Clark*, 85 Ind. 449; *Barton v. McWhinney*, 85 Ind. 481; *Schrodt v. Deputy*, 88 Ind. 90. So far as the second paragraph of the complaint demanded quieting of title, it was insufficient. The appellant claims that if his deed is invalid, he is nevertheless entitled to a lien upon the land for the sums paid by him as stated in the complaint, with interest thereon from the day of sale.

Section 256, 1 R. S. 1876, p. 129, provides that, "If any conveyance, made by the county auditor, pursuant to a sale made for non-payment of taxes, shall prove to be invalid and ineffectual to convey title, for any other cause than such as are enumerated in the preceding section," the State's lien for taxes and all lawful purposes shall be transferred by such deed to the grantee, who may recover from the owner of the land the amount he paid for taxes and all lawful charges, with interest at twenty-five per cent. from the day of sale, and also the amount paid by him for all subsequent taxes, with like interest, and that the same shall be a lien on the land, etc.

Section 257, p. 129, *supra*, provides that "Any person holding any deed of lands, executed by the county auditor for the non-payment of taxes, may commence a suit * * to quiet his

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title thereto, without taking possession of such lands." And if, upon the hearing of such cause, it shall appear that his title was invalid for any cause not enumerated as aforesaid, the court shall ascertain and give judgment for the plaintiff for the sums paid by him, and interest to be computed at the rate of twenty-five per cent. per annum, and in default of payment thereof, may direct the land to be sold to satisfy the same, etc.

The appellees claim that "if the pretended sale, alleged by appellant, was no sale within the meaning of the law, he can have no lien, as the lien is given only to purchasers at tax sales, and not to purchasers at sales unknown to the law; in other words, those made without authority of law. But the lien is given by the statutes to all who have paid the taxes due the State, and who hold the county auditor's deed executed for the non-payment of such taxes." The lien is given because of the invalidity of the title, and the object of it is obvious.

Sections 256 and 257, *supra*, provide for cases where the conveyance was ineffectual to convey title, and where the plaintiff's title was invalid for some cause not enumerated in the next preceding section.

In the present case the plaintiff's title, as stated in the complaint, was invalid for causes not enumerated in said preceding section. And section 6521, R. S. 1881, provides that "All liens for taxes, and all penalties, * * accrued under former laws, and existing at the time of the passage of this act, are hereby continued in force."

Under the averments of the complaint in this case, and in view of the following decisions of this court, we think that although the plaintiff's tax deed was ineffectual to convey title, yet he is entitled to the lien demanded. *Flinn v. Parsons*, 60 Ind. 573; *Duke v. Brown*, 65 Ind. 25; *Hosbrook v. Schooley*, 74 Ind. 51; *Sloan v. Sewell*, 81 Ind. 180; *Parker v. Goddard*, 81 Ind. 294; *Crecelius v. Mann*, 84 Ind. 147; *Jenkins v. Rice*, 84 Ind. 342; *Reed v. Earhart*, 88 Ind. 159.

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The complaint being sufficient as to a part of the relief demanded, the court below erred in sustaining the demurrers thereto. *Anderson v. Ackerman*, 88 Ind. 481.

The judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellees, and this cause is remanded, with instructions to the court to overrule the demurrers to the complaint.

Filed April 17, 1884.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellee claims that if a tax sale of land be void, the purchaser will not be entitled to a lien on the land for his purchase-money.

The cases cited in the principal opinion show that this claim can not be sustained. See, also, *Ward v. Montgomery*, 57 Ind. 276; *Hosbrook v. Schooley*, 74 Ind. 51; *Cooper v. Jackson*, 71 Ind. 244; *Lawson v. Hilgenberg*, 77 Ind. 221. In *Grecelius v. Mann*, cited in the principal opinion, this court said, by ELLIOTT, J.: "It is expressly declared by statute, and has often been decided by this court, that, although the tax sale be utterly void, the purchaser * * will be entitled to hold and enforce a lien for the taxes paid by him. The theory of the law is that the purchaser at such sale succeeds to the lien of the State."

The appellee claims that this doctrine ought not to be applied to the present case, because, as he avers, section 247, 1 R. S. 1876, p. 127, which authorized private sales by the county auditor of forfeited or unsold tax land, is unconstitutional, and he insists that no right can be acquired under an unconstitutional law. If it were conceded that such sales were unconstitutional, so that the auditor's conveyance was invalid and ineffectual to convey title, the lien of the State for the taxes would not thereby be impaired. Section 256, 1 R. S. 1876, p. 129, declares that, "If any conveyance, made by

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the county auditor, pursuant to a sale made for non-payment of taxes, shall prove to be invalid and ineffectual to convey title, for any other cause than such as are enumerated in the preceding section, the lien which the State had on such land for its rightful proportion of taxes, * * shall remain in full force, and shall be transferred by such deed to the grantee," etc.

In the present case, if the county auditor had no constitutional power to make a private sale of forfeited or unsold land for taxes, then his deed was invalid and ineffectual to convey title; if he had such constitutional power, his deed was invalid and ineffectual to convey title for other reasons, stated in the principal opinion, which were not "reasons enumerated in said preceding section." The deed being invalid, the State's lien for the unpaid taxes is transferred to the grantee, whatever be the cause of such invalidity, provided it be not one of the causes enumerated in the said preceding section. The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition is overruled.

Filed June 21, 1884.

No. 9087.

McSWEENEY ET AL. v. McMILLEN ET AL.

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| 96 | 296 |
| 126 | 596 |
| 96 | 298 |
| 140 | 489 |
| 140 | 571 |

INFANCY.—*Pleading.—Presumption.*—In pleading a contract it is not necessary to aver that the party sought to be bound was an adult, as, in the absence of averment and proof, that fact will be presumed.

EVIDENCE.—*Tax Duplicate.—Parol Partition.*—Where it is in controversy whether a parol partition had been made, the tax duplicate showing that the lands were taxed to the respective persons to whom they were supposed to have been allotted, is admissible in evidence as tending to show the partition.

SAME.—*Declarations of Ancestor.—Heir.—Title.*—Where, in partition, the title is in question, declarations of an ancestor from whom a party claims by descent, to the effect that the ancestor had no title, are admissible against such heir.

SAME.—*Witness.*—There is no error in refusing to allow a question to a witness, any answer to which would be wholly immaterial, and when no reason for asking the question is given.

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SAME.—*Declarations of Grantor.*—Declarations by a grantor in disparagement of the title granted, made after the grant and in the absence of the grantee, are not proper evidence against the grantee.

From the Rush Circuit Court.

F. J. Hall and *T. J. Newkirk*, for appellants.

G. C. Clark, *W. A. Cullen* and *B. L. Smith*, for appellees.

FRANKLIN, C.—Appellants filed against appellees a petition for the partition of ninety-seven acres of land, and part of the north half of lot No. 56, in the town of Rushville, and alleging that Mary A. E. McSweeney is the owner of the undivided one-third of the land and one-half of that portion of the lot, and asking that it be set apart and delivered to her.

The petition states, that one John McMillen, in March, 1857, died a resident of said county and State, leaving Mary McMillen, his widow, and Samuel E. McMillen, Rebecca Morris, James T. McMillen and Mary A. E. McMillen, his children; and, also, leaving a large amount of real estate, describing the same; that in 1857 Mary McMillen, said widow, caused partition to be made of said real estate, and in which partition the shares of said Samuel E., James T. and Mary A. E. were set off to them jointly, including the land and lot sought to be partitioned in this action; that on the 23d day of February, 1871, the said Samuel E. conveyed his interest in said ninety-seven acres of land to one George Shields, which afterwards passed through several conveyances down to one of the present appellees, William F. Gordon; that said part of lot No. 56 was conveyed by said James T. to one Norris, and reconveyed to different parties until the title reached another one of appellees, Maria Ryan; that the said Mary A. E., in 1869, intermarried with her co-appellant Dennis McSweeney, and prayed for partition of said premises.

All the defendants, except Gordon and Ryan, were either defaulted or disclaimed any interest in the premises.

Gordon and Ryan each filed separate answers, consisting

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of denials, and special paragraphs setting up title in themselves, each separately, Gordon to the ninety-seven acres of land, and Ryan to the part of the lot, and each pleaded the statute of limitations.

The second paragraph of each answer set out the partition as alleged in the petition, and the setting apart the said shares of said three jointly. It is then alleged that in 1858 these three, by agreement, made a partition of their said joint shares among themselves; that each then took possession of their respective shares as agreed upon, paid the taxes and made lasting and permanent improvements thereon, had the same in 1858 severally placed upon the tax-duplicate accordingly, and that the same has been so severally held and occupied from that time until the commencement of this suit; that the said ninety-seven acres of land, by said agreed partition, was set apart in the share of the said Samuel F.; and the said part of said lot was so set apart in the share of said James T.; and that each had been regularly conveyed from said parties down to said appellees.

The third paragraph of each averred quiet and peaceable adverse possession under claim of right and color of title for more than twenty years before the bringing of the suit, and each contained an additional paragraph of the statute of limitations.

A demurrer was overruled to these special paragraphs of answer, and a reply filed. There was a trial by jury, verdict for defendants, and, over a motion for a new trial, judgment was rendered for the defendants.

The errors assigned are the overruling of the demurrer to the second paragraph of Gordon's answer, and the overruling of the motion for a new trial.

The only objection presented by appellants' counsel to the second paragraph of Gordon's answer is, that it does not show that either of them, at the time of the alleged agreed partition, was of full age.

In this we think appellants are mistaken. The paragraph

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in controversy contains the following language: "That said Mary A. E. McMillen, who was then *adult*, sole and unmarried, from the day of the partition of said real estate, made between herself and her brothers in 1858 until the 9th day of February, 1869."

She was then said to be twenty-five years old and unmarried, and from the order of their names we presume the youngest of the children, but even if they were all minors at that time, such does not appear in the pleadings, and infancy is never presumed; it must either be pleaded or given in evidence. *Pitcher v. Laycock*, 7 Ind. 398.

"The law presumes all parties to a suit are adults, unless the contrary is made to appear." *Rowe v. Arnold*, 39 Ind. 24. *Palmer v. Wright*, 58 Ind. 486; *Davidson v. Nicholson*, 59 Ind. 411. If the contract of an infant "is with an adult, such adult person is bound, and can not avoid the contract on account of the infancy of the other contracting party." *Johnson v. Rockwell*, 12 Ind. 76. There was no error in overruling the demurrer to this paragraph of the answer.

As to the motion for a new trial, while the evidence in some respects appears to be conflicting, still there is evidence clearly tending to sustain the verdict of the jury, and, in such cases, this court will not weigh it in order to determine its preponderance. In the motion for a new trial various reasons are stated on account of the introduction in evidence of alleged improper evidence. The first of which was the giving in evidence the tax duplicates of the county for the year 1858 and subsequent years. The duplicates showed that the ninety-seven acres of land in controversy during said time and until he sold it was taxed separately to Samuel E. McMillen, and afterwards to the several purchasers, and that the part of said lot in controversy was so separately taxed to said James T. until he sold it, and afterwards to the several purchasers thereof; while seventy-four acres of other lands were so separately taxed to said Mary A. E. during said time. There was other evidence showing that appellant Mary A. E.

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had lived upon the home place allotted to her mother in the first partition, and adjoining the lands in dispute until she was married in 1869; that she had sold the seventy-four acres alleged to have been allotted to her in the agreed partition, and she and her husband moved to the State of Mississippi, where she remained until 1874, when they returned to Rush county, Indiana, and repurchased the same seventy-four acres that they had so sold, which also joins the land in dispute, and upon which they are still living.

We think these tax duplicates are competent evidence tending to show a division of the land by some kind of a partition, and that there was no error in their admission.

Reasons numbered five and six, based upon the overruling of objections to the introduction in evidence of the various deeds of conveyance for the land and part of lot in dispute, are not insisted upon by appellants in their brief, and are considered as waived; if they had been insisted upon, we see no reasonable objection to the rulings of the court therein.

The seventh reason for a new trial is based upon an objection to a question asked by defendants to the witness William Cullen in relation to a conversation he had with said Samuel E. McMillen, and the witness' answer thereto.

Upon cross-examination by plaintiffs, the witness was examined as to what inquiries he had made as to the title to that part of the lot in dispute at the time he purchased it, and after having testified that he did not examine the records, he was asked by the plaintiffs certain questions and gave the following answers:

"You made no further inquiry as to the title? Ans. I did.

"From whom? Ans. Samuel E. McMillen."

Upon re-examination, the witness was asked by defendants the following questions:

"You say you did make some inquiry? Ans. I did.

"What was the result of that inquiry?" Which was objected to. The objection was sustained. He was then asked: "Did you have any conversation with Samuel E. McMillen

in relation to this property?" Which was objected to, and the objection overruled. The witness answered that he told McMillen that he was about trading for the property, and that the person from whom he was to get it had a warranty deed for it, and he supposed the title was all right; he said that it was all right or something like that. This witness had been one of the owners of that part of the lot in controversy.

After the plaintiff in examination had introduced in evidence the fact that the witness had inquired of Samuel E. McMillen in relation to the title to the property generally, we think the defendant then had a right to prove by the witness what was said as a part of the *res gestæ*, or inquiry proven to have been made. Though if we should be mistaken in this, there is another view of the question that would render the testimony admissible. At the time of the trial Samuel E. McMillen was dead, and the plaintiff not only claimed her third of that part of the lot as never having been divided, but she also claimed the half of Samuel E.'s third, as his heir, he leaving no children, making her claim therein one-half. And as to Samuel's interest therein, his admissions of no title in himself would be evidence against the plaintiff to the extent that she claimed as his heir.

The eighth reason, based upon the sustaining of an objection to Dennis McSweeney's testimony in relation to a conversation with Samuel E. McMillen in relation to the land, is a mistake or the record is wrong. The record shows that the objection was overruled and the evidence was given to the jury.

The ninth reason is based upon the sustaining of an objection to a question asked by plaintiff of Mary A. E., while testifying in her own behalf, which reads as follows: "State whether or not you had any conversation with Samuel with reference to his interest in this lot 56, here in town, that you sold after Jim had sold it?"

This is a mere introductory question, any answer to which that could have been made could not have benefited or in-

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jured either party, and when objected to no reason appears to have been stated to the court for asking the question. There is no available error in this ruling.

The tenth reason is for sustaining an objection to Frank Hall's testifying in relation to a conversation had by him with James T. in 1879 in relation to the parol partition of the premises between the parties. James T. was only a nominal party to the suit, not asserting any interest in the premises; he had long before that time sold and parted with all his interest in the premises. His testimony had been taken in the case, and no question had been asked him in reference to any conversation with Hall. Under such circumstances nothing that he could have said in disparagement of the title after he had parted with it, and in the absence of the real defendants, could be admitted as evidence against them, either in the shape of admissions or by way of impeachment. And there was no error in this ruling.

The eleventh reason for a new trial was that the court erred in giving instructions to the jury. No specific error in the instructions has been pointed out by appellants in their brief; we have a right to presume there is none, and consider this objection as waived. We find no available error in this record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed June 21, 1884.

No. 11,722.

MULLEN v. THE STATE.

INTOXICATING LIQUOR.—*Selling Without License.—Indictment.*—An indictment for selling intoxicating liquor without license, under section 5312, R. S. 1881, which shows a sale of "less than a quart," is sufficient, without alleging that the sale was made *at one time*.

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SAME.—Evidence.—Beer.—An inference by the jury that “beer,” sold in a saloon, was malt liquor will not be held unwarranted by the Supreme Court.

From the Monroe Circuit Court.

J. W. Buskirk and *H. C. Duncan*, for appellant.

F. T. Hord, Attorney General, *J. E. Henley*, Prosecuting Attorney, and *W. B. Hord*, for the State.

NIBLACK, J.—The indictment in this case charged that *Pat Mullen*, of the county of Monroe, in this State, “on the 20th day of August, A. D. 1883, at said county and State, * * did then and there unlawfully sell to one *William Campbell* intoxicating liquor in less quantity than a quart, to wit, one gill of beer, at and for the price of five cents, he, the said *Pat Mullen*, not then and there having a license to sell such intoxicating liquors in a less quantity than a quart at a time.”

A motion to quash the indictment being first denied, the circuit court found the defendant guilty as charged and adjudged him to pay a fine of \$20.

Section 5312, R. S. 1881, enacts that “It shall be unlawful for any person, directly or indirectly, to sell, barter, or give away, for any purpose of gain, any spirituous, vinous, or malt liquor, in a less quantity than a quart at a time, without first procuring, from the board of commissioners of the county in which such liquor is to be sold, a license as hereinafter provided.”

It is claimed that the indictment was essentially defective in not charging that the intoxicating liquor was sold in a less quantity than a quart *at a time*, and that for that reason the circuit court erred in overruling the motion to quash the indictment.

In support of this claim the arguments and illustrations used by this court in the case of *Arbintrode v. State*, 67 Ind. 267 (33 Am. R. 36), are relied upon, in connection with other cases holding that generally an offence must be charged substantially in the language of the statute defining it. But the

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point really decided in that case was that in charging the unlawful sale of intoxicating liquor in cases like this, it was necessary to use such words as would convey to the mind the definite idea that a sale had been made of a less quantity than a quart, and it was held incidentally that in so charging no particular form of words need be adopted.

The words used in charging the alleged offence in this case were sufficient to convey to the mind the definite idea that less than a quart of beer had been sold at one time to the prosecuting witness, and in that respect nothing more was required.

It is further claimed that the finding of the circuit court was not sustained by the evidence: *First*. Because there was no proof that the beer sold was intoxicating. *Secondly*. Because no particular sale was sufficiently identified.

Campbell, the prosecuting witness, testified that he was acquainted with the defendant in August, 1883; that at that time the defendant was a clerk in Stockwell's saloon, on the Avenue, in Monroe county, in this State; that there were two others clerking there at the same time; that he, witness, bought a glass of beer in the saloon and paid five cents for it; that he thought he bought the beer of the defendant, but it might have been from one of the other clerks; that he was sure that about that time he bought beer of the defendant; that the glass of beer he bought was less than a quart; that he bought more beer about that time from all the bar-keepers in the saloon.

The fair inference from the testimony thus given was that the beer purchased by him was malt beer, and hence intoxicating liquor within the meaning of the statute. *Myers v. State*, 93 Ind. 251; R. S. 1881, section 5313.

The evidence was also sufficient to justify the circuit court in finding that a sale of beer had been made by the defendant as charged in the indictment.

The judgment is affirmed, with costs.

Filed June 21, 1884.

 Jones et al. v. Castor.

No. 11,170.

JONES ET AL. v. CASTOR.

SUPREME COURT.—*Assignment of Errors*.—An error not well assigned as to all appellants who join in it, is not available on behalf of any of them.

SAME.—A question which has been decided by the Supreme Court on appeal, will not be considered again on a subsequent appeal of the cause.

From the Montgomery Circuit Court.

P. S. Kennedy, S. C. Kennedy, T. H. Ristine, B. T. Ristine and H. H. Ristine, for appellants.

G. D. Hurley, B. Crane and A. B. Anderson, for appellee.

BICKNELL, C. C.—Israel Castor died seized of real estate, leaving a widow and several children. By his will he devised to Daniel Rhoads the real estate, “to have and to hold full use thereof in every way during the natural lives of the testator and his wife Amy Castor, he to pay all taxes and to take care of the testator and wife during their natural lives, and to pay the testator \$250 by the 1st of January in each year, commencing January 1st, 1875, during the natural lives of the testator and his wife, and if not paid at the time to draw ten per cent. interest, said Rhoads to live on said farm and in said house with the testator, to comply with said will during the natural lives of the testator and his wife, and if said Rhoads shall leave said farm this to be null and void.”

The children brought a suit to set aside the will, and on a compromise, by agreement a decree was made establishing the will, and Rhoads mortgaged the land to Jonas H. Jones, as trustee, to secure \$3,600, payable to the children. Jones foreclosed his mortgage, and at the foreclosure sale bought in the property and took the sheriff's certificate of sale.

The widow, Amy Castor, then brought this suit against Rhoads and Jones, stating in her complaint the foregoing facts, claiming that under the will she was entitled to receive from Rhoads \$250 annually, and alleging that Jones bought the land with full knowledge of her claim; that Rhoads was administrator with said will annexed, and had made final

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settlement, and had been discharged, and that there were no outstanding claims against the estate; that Rhoads had been in possession of the land ever since the testator's death, and had refused to pay said annuity. The complaint prayed that said annuity be declared a senior lien, and that the land be sold to pay it.

The defendant Rhoads was defaulted. The defendant Jones answered in three paragraphs, each alleging that the plaintiff is estopped. Demurrers to the first and second of these paragraphs were overruled; to the third paragraph a demurrer was sustained.

The plaintiff replied to said first and second paragraphs: 1st. In denial. 2d. Specially. The issues were tried by the court who found for the plaintiff \$2,797.50, and that the same is a first lien and charge on said land, and that said Daniel Rhoads is indebted to the plaintiff \$2,797.50.

The defendant Jones moved for a new trial, because

1. The damages are excessive.
2. The amount of recovery is too large.
3. The finding is not sustained by sufficient evidence.
4. The finding is contrary to law.

This motion was overruled. The defendant Jones moved for judgment on the pleadings, notwithstanding the finding, and for judgment on the third paragraph of his answer. These motions were overruled.

The defendant Jones also moved in arrest of judgment, and this motion was overruled. Judgment was rendered upon the finding and for the sale of the land to satisfy the plaintiff's lien. The defendant Jones prayed an appeal, but both defendants join in an assignment of errors, which is as follows:

"George A. Jones, Daniel Rhoads, appellants, v. Amy Castor, appellee. Assignment of errors. The appellants say there is manifest error in the proceedings and judgment in this cause, and they specifically assign the following:

- "1. That the complaint does not state facts sufficient to constitute a cause of action.

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"2. The court erred in sustaining a demurrer to the third paragraph of answer.

"3. The court erred in overruling the motion for a new trial.

"4 and 5. The court erred in overruling the motions for judgment on the pleadings, and for judgment on the third paragraph of answer.

"6. The court erred in overruling the motion in arrest of judgment. For which errors the appellants pray that the judgment be in all things reversed."

The appellee claims that as the assignment of errors is joint, and all the specifications of error except the first state rulings against Jones alone, therefore there is no error well assigned except that stated in the first specification. In this the appellee is clearly right, and there is nothing to be considered except the question whether the complaint states facts sufficient to constitute a cause of action. *Williams v. Riley*, 88 Ind. 290; *Towell v. Hollweg*, 81 Ind. 154; *Eichbredt v. Angerman*, 80 Ind. 208; *Feeney v. Mazelin*, 87 Ind. 226. A joint assignment of errors is like a joint demurrer, which, if not well taken by all, is not well taken by any. *Estep v. Burke*, 19 Ind. 87; *Teter v. Hinders*, 19 Ind. 93.

Upon the former appeal in this case (*Castor v. Jones*, 86 Ind 289) the complaint was held sufficient, the court said that the widow was entitled to the annuity, and that it was in fact a legacy charged on the land.

After the cause was remanded to the circuit court, the plaintiff filed a supplemental paragraph of complaint, the same as the former paragraph, except that it contained the further averments that the defendant Jones in the mean time had obtained the sheriff's deed for the land, and that three more annual payments of \$250 each had become due, the last one on January 1st, 1883.

The rule is that the decision of the Supreme Court on an appeal remains the law of the appealed cause throughout. The complaint here having been once held sufficient can not

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be successfully assailed again. *Dodge v. Gaylord*, 53 Ind. 365; *Board, etc., v. Jameson*, 86 Ind. 154; *Gerber v. Friday*, 87 Ind. 366; *Anderson v. Kramer*, 93 Ind. 170. There is no available error in the record, and the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Feb. 20, 1884.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—A rehearing is claimed because the brief of the appellee, as originally prepared, contained no statement of the objection, that the assignment of errors is joint, and because, afterwards, such an objection was added to the brief. The petition claims that this objection was “surreptitiously inserted in the brief and pressed upon the court.”

It is not unusual to file an additional brief, or to add new matter to an existing brief, and under Rule 16 of this court, as it stood prior to May 14th, 1884, the appellee had the right to file a brief at any time before the cause was taken up for consideration.

But whether an objection be made in the brief of the appellee or not, if the record shows the defect, this court is not required to disregard it because the appellants' counsel was not aware of it.

The rule is that if there are points in the record not suggested by counsel nor perceived by the court, such points will not be considered on a petition for a rehearing, but the court can not refuse to consider points of which it is made aware either by the suggestions of counsel or by its own examination of the record. *Martin v. Martin*, 74 Ind. 207.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed June 21, 1884.

Weir v. The State, *ex rel.* Axtell.

No. 11,004.

WEIR v. THE STATE, EX REL. AXTELL.

COUNTY COMMISSIONERS.—*Appointment of Secretary for Board of Health.*—

Term of Office.—The term of secretary of the county board of health is, by section 4993, R. S. 1881, one year, and the county board, after having elected, can not annul their action, nor elect a successor until the year has expired.

SAME—Contest of Appointment.—Eligibility.—Complaint.—The only qualification required of the secretary of a county board of health is that he shall be a physician, and in a contest for the office it is sufficient to so state, but an averment merely that he is competent and qualified, is fatally insufficient.

SAME.—Evidence.—Record.—Collateral Attack.—In a collateral inquiry, a record of the county board showing an act done on a certain day, can not be questioned by proof that on that day the board was not in session, and such a record though not signed, is competent evidence of the act done.

PLEADING.—Complaint.—Practice.—Overruling a demurrer to a bad paragraph of a complaint, though there be others which are good, embracing the same averments, is always a fatal error available to the defendant.

From the Monroe Circuit Court.

J. H. Loudon and *R. W. Miers*, for appellant.

J. W. Buskirk and *H. C. Duncan*, for appellee.

ELLIOTT, C. J.—The first paragraph of the relator's complaint alleges that he was, on the 1st day of January, 1883, and has since been a citizen of Bloomington, Monroe county, Indiana, and a regular practicing physician and surgeon; that on the day named he was elected by the board of commissioners of Monroe county, Indiana, secretary of the board of health of said county, and an order declaring his election and fixing his salary at \$150 per annum was entered of record; that he accepted the position to which he was elected, and entered his acceptance in writing on the commissioners' record; that on the second day of January, 1883, the board of commissioners, without the knowledge or consent of the relator, assumed to elect the appellant to the same position as that to which the relator was elected on the previous day. The

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prayer is that the relator be adjudged entitled to the office and that the appellant be ousted.

Counsel for the appellant insist that the court erred in overruling a demurrer to this paragraph of the complaint.

The objection first urged against this paragraph of the complaint is that it affirmatively shows that the relator's election was annulled the day after it took place by the election of the appellant. This objection can not prevail. County commissioners, having once exercised the power of selecting an officer, can not annul the election by electing another person. If it were otherwise, then the board might elect every month, week, or even every secular day of the year, and the statute never contemplated any such a thing as that. Where an inferior court is entrusted with the power of appointing an officer for a term definitely fixed by statute, the officer will hold for the term so fixed. An officer whose term is designated by statute takes the office for that term, and does not hold it at the pleasure of the appointing power. The provision of the statute is that the board shall annually, in the month of January, elect a secretary, and this fixes the term of office at one year, that is, from the month of January of one year to the month of January of the succeeding year. A statute, empowering an inferior tribunal to do certain things, is an enabling act empowering it to do just what is provided in the act. In the present case the enabling act authorizes the commissioners to elect the secretary of the board of health for one year, and when the commissioners once exercise this power they exhaust it, and can not, unless there is a vacancy or something of the kind, hold another election until the time fixed by law has arrived.

A right to amend a record does not confer a right to change or set aside an act done; the act is one thing, the record of the act quite another. *Wray v. Hill*, 85 Ind. 546. If, therefore, the appellant is right in affirming that the board of commissioners have power to change the record, it would not carry him to the conclusion he seeks to reach, for a right

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to amend or alter a record does not include a right to annul a decision or set aside an act fully performed. It is the act of appointment, and not the mere recital of the record which clothes the appointee with official character. It is settled law that even where the act is a judicial one the board can not set aside an order once finally and fully made. *Board, etc., v. State, ex rel.*, 61 Ind. 75; *Doctor v. Hartman*, 74 Ind. 221; *Board, etc., v. Logansport, etc., Co.*, 88 Ind. 199. In the present instance the appointment was made and accepted by the appointee, and there remained nothing to be done, for the act was duly consummated. The election of an officer is not an act of an ordinary business character in which a discretion is exercised by the commissioners, but is the exercise of a special statutory authority, and few rules are better settled than that such an authority must be exercised in conformity to the statute conferring it. It can not, therefore, be justly held that the rules which prevail in respect to the transaction of ordinary county business, or the management of ordinary county affairs, apply to the case of the election of an officer under a statute specially conferring authority to elect the officer at a designated time, and for a definite period.

Another objection stated to this paragraph of the complaint is that it does not show that the relator was eligible to the office of secretary of the board of health. It is true that one who seeks to obtain admission to an office must aver such facts as show him to be eligible to the office claimed. *State, ex rel., v. Long*, 91 Ind. 351; *State, ex rel., v. Bieler*, 87 Ind. 320; *Reynolds v. State, ex rel.*, 61 Ind. 392. It is not necessary that the complaint should in express terms aver that the claimant is eligible; it is sufficient if such facts are stated as show him to be eligible. The rules of pleading require the statement of facts, and it is proper, therefore, to plead the facts out of which the inference of law that the claimant is eligible arises.

The only requisite to eligibility prescribed by the statute is that the person elected shall be a physician. The paragraph of complaint we are discussing alleges that the relator was a

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physician and surgeon at the time of his election, and this is a sufficient statement upon this point.

There was no error in overruling the demurrer to the first paragraph of the complaint.

The second paragraph of the complaint is similar to the first, except that it does not contain in express terms the averment that the relator was eligible to the office he claims, nor does it aver that he was a physician. This is a material difference. It is, however, argued that the ruling on the demurrer was harmless, for the reason that the same facts were admissible in evidence under the first paragraph of the complaint.

Counsel fall into the error of confusing a ruling sustaining a demurrer, with one overruling a demurrer, whereas there is an essential difference between the two cases. Where a demurrer is sustained to one of two similar paragraphs, no harm is done the pleader, because enough is left to give him all the benefit of his evidence; but where a demurrer is overruled, harm is done the demurring party, because the court adjudges that all the plaintiff need prove to make out his case is that contained in the paragraph to which the demurrer is overruled. The case at bar supplies a strong illustration of the injustice of the doctrine which the relator maintains; for, under the ruling of the court, all he need do to secure a recovery, is to prove the second paragraph of his complaint, and this dispenses with a very essential element in his cause of action, namely, his eligibility to the office to which he demands admission. Where a demurrer is overruled to a bad paragraph, it is an expression of the judgment of the court as to the law upon the facts stated, and is equivalent to an announcement of the court that if the evidence establishes the facts pleaded the plaintiff makes out his case. It is obvious that if the paragraph be insufficient, the court has, in such a case, laid down an erroneous rule for the government of the case, and the error does the demurring party harm, and gives him just reason to complain. It must be kept in mind

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that a plaintiff is not bound to prove all the paragraphs of his complaint, and it follows that if an insufficient paragraph is held good, the theory involved in the ruling on the demurrer gives the plaintiff a right of recovery where he really has no cause of action. It is a familiar general rule that a party who once properly makes his objection to a ruling of the court, and duly saves an exception, is not bound to repeat his objections or exceptions; so that an objection once well made and reserved to an erroneous theory of the trial court stands throughout the trial. We have many cases illustrating the difference between overruling and sustaining a demurrer, and showing the soundness of the rule that where a demurrer is overruled to a bad paragraph the error is material, although there may be other paragraphs of the same general character, but which contain the averments wanting in the bad one. *Abdil v. Abdil*, 33 Ind. 460; *Schafer v. State*, 49 Ind. 460, see auth. cited, p. 468; *Kimble v. Christie*, 55 Ind. 140; *Abell v. Riddle*, 75 Ind. 345; *Over v. Shannon*, 75 Ind. 352; *Johnson v. Breedlove*, 72 Ind. 368; *Conyers v. Mericles*, 75 Ind. 443; *Sims v. City of Frankfort*, 79 Ind. 446, see opinion, p. 449; *Wilson v. Town of Monticello*, 85 Ind. 10. We are, therefore, required to examine the pleading under immediate mention and determine its sufficiency.

The relator maintains that although the word eligible is not used, there are two words, namely, qualified and competent, which express the same meaning, and that, therefore, the pleading is good. In strictness, a pleading should state facts showing that the claimant is eligible and leave the conclusion of law to the court, but conceding, without deciding, that it is enough to state the conclusion, we will examine as to the sufficiency of the language employed. It seems to us very clear that a man may be both competent and qualified and yet not eligible. A man may possess all the necessary intellectual and moral endowments essential to capacity and competency, and yet not be eligible to office. Something more than competency and qualification is essential, and is

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embraced by the term eligible. *Steinback v. State, ex rel.*, 38 Ind. 483; *Carson v. McPhetridge*, 15 Ind. 327; *Jeffries v. Rowe*, 63 Ind. 592; Bouvier Dict., title, Eligible; Abbott Dict., same title; Adjudged Words & Phrases, same title. It can not, in our opinion, be held sufficient in such a case as this to aver that a man is competent and qualified to hold an office. The rules of pleading require much more than a statement of a conclusion in words so general and inapt as those chosen by the relator.

A question was made on the introduction of evidence which must necessarily arise on another trial, and it is therefore proper that we should decide it. The court refused to permit the appellant to show that the commissioners did not hold a session on the first day of January, 1883. In this there was no error. The record introduced in evidence, recited that the board did meet and did hold an election on that day which resulted in the choice of the relator, and this record concluded the parties from attacking it in this collateral proceeding. A record can not be overthrown in a collateral attack of this nature.

Another question is to be decided, and that is this: Is the record of a commissioners' court, showing an election, without force for the reason that it was not signed? We think it clear that where the attack is a collateral one, it must be held that it is not void but supplies competent evidence of the action of the board.

For the error in overruling the demurrer to the second paragraph of the complaint the judgment is reversed.

Filed June 21, 1884.

 No. 11,466.

NICOLES v. CALVERT.

INSTRUCTIONS.—*Practice.*—It is not error to refuse a special instruction when the general instructions given embraced the principles of law asserted in the special instruction asked.

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SAME.—*Construction*.—An instruction is not to be judged by detached clauses, but if, when considered as an entirety, it states correct propositions of law, it will be upheld.

SUPREME COURT.—*Weight of Evidence*.—The Supreme Court will not disturb a verdict on the weight of the evidence.

From the Pulaski Circuit Court.

G. Burson and R. L. Mattingly, for appellant.

J. C. Nye and J. Nye, for appellee.

COLERICK, C.—This action was brought by the appellee upon a promissory note executed by the appellant to Beckwith & Lee, and by them assigned to the appellee. The issues were tried by a jury, and resulted in the rendition of a verdict for \$105.87 in favor of the appellee, upon which, over a motion for a new trial, judgment was rendered. The only error assigned is the ruling of the court upon the motion for a new trial. The reasons assigned in support of the motion were:

1. That the verdict was not sustained by sufficient evidence.
2. That the verdict was contrary to the evidence and law.
3. That the court erred in refusing to give to the jury certain special instructions presented by the appellant, and numbered one and two.
4. That the court erred in giving to the jury, on its own motion, instruction numbered six.
5. That the damages assessed were excessive.

We have examined the evidence and find that, although conflicting, it tends to sustain the verdict. We can not, under the well settled practice of this court, disturb the verdict on the weight of the evidence.

The principles of law, correctly enunciated in the special instructions mentioned in the third specification of the reasons assigned in support of the motion for a new trial, were predicated upon the facts averred in the second and third paragraphs of the appellant's answer to the complaint. The court, in its third and fourth instructions, recited all the material averments contained in said paragraphs of the answer,

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and in its fifth instruction stated to the jury: "If you find that he (appellant) has proven either of these defences by a fair preponderance of the evidence, then your verdict should be for the defendant." As the instructions given by the court, on its own motion, embodied and covered the principles of law asserted in the special instructions, no error was committed in refusing to give the latter. See *Fitzgerald v. Jerolaman*, 10 Ind. 338; Works Pr., section 783, and cases there cited.

The appellant separates from the body of the sixth instruction, given by the court, a fragment thereof, which he assails. It has been held by this court that "Instructions are not to be judged by detached clauses or sentences, but are to be taken as entireties, and if correct when thus considered, they will be upheld." *Wright v. Fansler*, 90 Ind. 492. The instruction, considered as an entirety, was not erroneous.

The amount that the appellee was entitled to recover upon the note in suit, as fixed by its provisions, was the principal and interest thereof, with ten per cent. thereon as attorney fees, and this was the sum awarded by the jury. The evidence adduced at the trial relative to the consideration for which the note was given was conflicting. The appellee insisted and introduced evidence showing that the note was executed for money that had been loaned to the appellant by one James Harmon, for whose benefit the note was given. Assuming, in view of the conflicting character of the evidence, that the jury found that that was the consideration inducing the execution of the note, the damages assessed were not excessive. As there is no error in the record the judgment ought to be affirmed.

PER CURIAM.—The judgment is affirmed, at the costs of the appellant.

Filed June 21, 1884.

 Breedlove et al. v. Bundy.

No. 10,745.

BREEDLOVE ET AL. v. BUNDY.

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FRAUD.—Conspiracy.—Where several conspire to defraud another for the benefit of one, all are liable in damages for the fraud.

CONTINUANCE.—Absent Witness.—An application for a continuance by a party who has previously obtained a continuance may, in the discretion of the court, be strictly scrutinized, and in the absence of manifest abuse, a refusal of the continuance will not be available error.

PRACTICE.—Evidence after Argument.—It is in the discretion of the court, for the furtherance of justice, to permit the introduction of omitted evidence after the close of the argument.

SAME.—Recalling Jury for Instructions.—The court may, after the retirement of the jury, recall it and give further proper instructions.

EVIDENCE.—Insanity.—Witness.—The record of justices, made in 1872, finding a person to be insane and a proper person to be admitted to the insane hospital for curable insane, is not admissible evidence as tending to prove that the same person, offered as a witness, was insane in 1881.

From the Superior Court of Marion County.

T. E. Johnson and *I. Klingensmith*, for appellants.

W. Wallace, L. Wallace, N. Morris and *L. Newberger*, for appellee.

FRANKLIN, C.—The error complained of in this court is that the court in general term erred in affirming the judgment of the special term.

The errors assigned in the general term were:

1st. Overruling the separate demurrer of appellant Breedlove to the complaint.

2d. Overruling the separate demurrer of appellant McClellan to the complaint.

3d. Overruling the motion of Breedlove and McClellan for a new trial.

The sufficiency of the complaint is first presented, which reads substantially as follows: That appellants, Breedlove and McClellan, together with their co-defendants, Gossett and Gause, on the 1st day of May, 1879, conspired and confederated together to cheat, swindle and defraud the plaintiff of

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a certain stock of goods owned and kept by him in a grocery store in the city of Indianapolis in said county, of the value of \$1,000; "that, in pursuance of said conspiracy and confederation, said Breedlove and McClellan came together on or about said day to this plaintiff and proposed selling the said stock and good-will for the said plaintiff, and informed him that the said defendant Gossett was desirous of purchasing the same, and had certain notes and mortgage, executed by the defendant Gause, which said Gossett would trade and exchange for the said stock and good-will; and said Breedlove then and there said and represented to the plaintiff that said notes, aggregating in amount the sum of \$675, were part of the consideration for certain real estate in the town of Plainfield, in Hendricks county, and State of Indiana, and were secured by mortgage on such real estate, and that said real estate was very valuable and was worth \$4,000; that said McClellan corroborated and assented to all the foregoing representations; that the same were made for the purpose and with the intent of inducing the plaintiff to make and enter into the bargain and trade hereinafter set forth; that the said Breedlove and this plaintiff were members of the Masonic Order, and said plaintiff, on account of such membership, imposed trust and confidence in the said Breedlove, which fact the said Breedlove well knew; that this plaintiff then said that if a satisfactory arrangement could be made, he, the said plaintiff, would be willing to sell out said store and business for \$700 cash, as he was desirous of quitting said business and was in need of the money; that afterwards, to wit, on the — day of May, 1879, said Gossett came to the said place of business of this plaintiff and represented himself as ready and willing to carry out and make the said trade proposed by said Breedlove and McClellan as aforesaid, and, in pursuance of the aforesaid conspiracy and confederation, said and represented to the said plaintiff that the defendant Gause had purchased the interest of his wife, Phoebe A. Gossett, in certain real estate (de-

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scribing it), and that said Gause owned all but one-seventh of said real estate, and that said Gause had paid for said interest of said Phoebe A. Gossett, \$975, \$300 in cash and the remainder in five notes, all dated March 27th, 1879 (describing the notes), and which notes were secured by a first mortgage upon all the real estate aforesaid, and that Gause had money in Harrisons' Bank in the city of Indianapolis, and had proposed to discount said notes for \$600, and that said real estate was worth more than \$2,000; that afterwards, to wit, on the 8th day of May, 1879, said defendants Gossett and Gause came together to the plaintiff, and, in pursuance of the conspiracy and confederation aforesaid, the said Gause confirmed the said representations and statements of said Gossett, and said that said notes were well secured and worth their face; that all the foregoing representations and statements were and are false and fraudulent, and were made in pursuance to the conspiracy aforesaid, and for the purpose of fraudulently inducing this plaintiff to bargain and sell said stock of goods for said notes; and that the said defendants did each and all impose upon the trust and confidence of this plaintiff in the said Breedlove for the reasons aforesaid, to prevent this plaintiff from investigating the said property; and that said Gause did acknowledge said indebtedness, and express a willingness to pay the same in pursuance to said conspiracy, and for the purpose of deceiving this plaintiff, and prevent him from investigating said real estate; that on account of the said representations, and induced thereto by them, this plaintiff did bargain and sell the said stock of goods and the said goodwill of said establishment to said Gossett, and did pay to him, the said Gossett, the sum of \$25 in cash, and the said notes and mortgage, and did deliver possession to said Gossett; * * that said plaintiff relied entirely upon said representations; that said mortgage was not a first lien upon the real estate aforesaid and said real estate is worthless, and enough to pay the costs of foreclosing said mortgage can not be real-

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ized therefrom; and that said Gause never had any title whatever to said real estate, and now refuses to pay the notes aforesaid." Wherefore, etc.

Breedlove and McClellan have alone appealed and assigned errors, and they insist that the complaint, as to them, is insufficient. The complaint sufficiently charges a conspiracy between all the defendants.

The law is well settled that if there was a conspiracy between them, each of them engaged in the conspiracy is liable for the acts and declarations of the others so engaged, done and made in pursuance of the conspiracy. *Boaz v. Tate*, 43 Ind. 60.

The facts alleged in the complaint sufficiently show that a fraud was committed upon the plaintiff, and as it is alleged that these appellants were engaged in the conspiracy by which the fraud was committed, they are to be held responsible alike with those by whom it was actually committed. There is no error in overruling their separate demurrers to the complaint.

The first reason in the motion for a new trial, insisted upon by appellants, is the overruling of their motion for a continuance. This was an application for a second continuance of the cause, after the appellants had procured its continuance upon their affidavit at the previous term. We do not think that sufficient diligence is shown to have been used to procure the testimony of the absent witness, or sufficient certainty that the evidence of the absent witness, if the cause was continued, would be procured by the next term. The witness appeared to be transitory, going from one point to another in the State of Pennsylvania, without any settled home. In such cases a reasonable discretion must be left to the trial court, and in this case we do not see that there was an abuse of such discretion by the overruling of the motion for a continuance. *Shattuck v. Myers*, 13 Ind. 46. There is no available error in this ruling.

The next reason for a new trial insisted upon by appellants, is, that after the evidence had closed, and the argument of

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counsel had been completed, the court, over the objection of appellants, permitted appellee to read in evidence the notes and mortgage. This action was not based upon the notes and mortgage, but was for damages for the fraud alleged to have been practiced upon appellee. While appellee had no right to demand the further hearing of evidence at that stage of the trial, yet the court had the discretionary right, in the furtherance of justice, to supply a technical omission by admitting the evidence, and its admission under such circumstances can not constitute available error.

Upon the seventh and eighth reasons for a new trial no error has been pointed out, and we do not feel required to search for any.

The ninth and tenth reasons, based upon instructions to the jury, question the action of the court in calling back the jury after they had retired for deliberation upon their verdict, and giving to them further instructions. The additional instructions given to the jury when called back are as follows: "For example, suppose you find for the plaintiff, and that the notes and mortgage were totally worthless, then your verdict should be for an amount equal to the principal and interest due on said notes at the date of their transfer to the plaintiff, to which you will add interest at the rate of six per cent. per annum from the date of the transfer to January 29th, 1881." Again: "If you find for plaintiff, and that the notes and mortgage were worth, say \$100, but no more, that is, that said amount, but no more, could have been collected thereon at the date of such transfer, then your verdict should be for an amount equal to the principal and interest due on said notes at the date of such transfer, less \$100, and to the sum representing this difference you will add interest at the rate of six per cent."

The jury had not been instructed upon the amount of the damages to be recovered, if any, and there was no error in the court's calling them back and instructing them upon that subject. But it is further objected by appellants that the

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additional instruction substantially told the jury to find for the plaintiff.

We do not think the language used is susceptible of that construction. The court merely told the jury, if they found for the plaintiff, how to arrive at the amount of damages they should assess in his favor. But the questions whether they should find for the plaintiff, or what value they should attach to the notes at the time they were transferred, were left entirely to the jury. There was no error in this additional instruction.

The thirteenth and last reason for a new trial is also insisted upon by appellants; all the others, not decided, are waived by appellants not discussing them in their brief.

This last reason is for the court's refusal to admit in evidence a certain record contained in the "insane record" on file in the clerk's office in Marion county, Indiana.

When appellee was introduced as a witness in his own behalf, appellants' counsel objected, upon the alleged ground that appellee was an insane person. They made no offer to prove his then insanity, but offered to introduce a record made nine years before in 1872, by two justices of the peace, certifying that appellant was then insane and had been so for two weeks, and that he was a suitable person to be admitted into the hospital for the curable insane, to be treated for that disease. The record shows that he was then so committed. But it also substantially shows that his then insanity was but temporary, and that he was supposed to be curable.

After the lapse of so long a time, when he was presented upon the witness stand, we think the reasonable presumption would be, there being no proof to the contrary, that he was then sane, that he had been cured and discharged from the hospital; and we think this presumption outweighs any legal presumption, if any exists, of any permanent or continuous insanity inferable from the proceedings contained in said record.

This is not like a case where the lunatic has been regularly adjudged insane by an inquisition and placed under guardianship,

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after which the presumption of insanity continues until he has been regularly adjudged sane and discharged from his guardianship. We do not think such a presumption as that can apply to this case. There being no evidence as to the condition of his mind at the time of the trial, from his appearance and demeanor the court may have deemed him competent to testify, and there was no error in excluding the record. *Hardenbrook v. Sherwood*, 72 Ind. 403. There is no available error in this record.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 6, 1884.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The complaint sets forth that the defendants conspired together to cheat the plaintiff by the means thereafter set forth. It then states that Breedlove and McClellan came together to the plaintiff, and Breedlove made certain representations which McClellan corroborated, and on which the plaintiff relied, because he had confidence in Breedlove as a brother Mason; that Gossett, a few days afterwards, made like representations as to certain notes proposed to be given for plaintiff's stock of groceries and the good-will of his trade; that a day or two thereafter Gossett and Gause came together to the plaintiff and made similar representations as to said notes and the land for which they were given, and as to a mortgage by which they were alleged to be secured; that plaintiff, in consequence of his confidence in Breedlove as a Mason, made no examination as to said real estate, but relying on said representations, sold said stock and good-will to Gossett, took therefor said notes and mortgage, paid Gossett \$25 to boot, and delivered to him the goods; that all of said representations were false and fraudulent, and were made in pursuance of said conspiracy and for the purpose of inducing the plaintiff to sell said goods for said notes

Concannon *et al.* v. Noble.

and mortgage. Wherefore, etc. Several of the representations were of material matters of fact.

The complaint stated a good cause of action against all of the defendants, and the separate demurrers of the defendants Breedlove and McClellan were properly overruled.

In the complaint the plaintiff, in averring the completion of the sale, has omitted a word which ought to be supplied; he says he sold the stock of goods and the good-will to Gossett, "and did pay him the sum of \$25 in cash, and the said notes and mortgage, and delivered to him the possession of the goods," etc.

Here the word "received" was omitted before the words "said notes and mortgage." Supplying that word, the statement will be that the plaintiff sold the goods, etc., to Gossett, "and did pay him the sum of \$25 in cash, and received the said notes and mortgage, and delivered to him the possession of the goods," etc. This defect in the pleading might have been amended by the court below, and must be deemed to be amended in this court. R. S. 1881, section 658.

As to the motion for a new trial, we think it needless to add anything to the principal opinion.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed June 21, 1884.

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No. 10,694.

CONCANNON ET AL. v. NOBLE.

PARTIES.—*Judgment, Review of.*—Where a judgment is sought to be reviewed in the court below, all parties to the original action affected thereby must be brought into court.

From the Laporte Circuit Court.

S. E. Williams, J. Crumpacker, A. C. Harris and W. H. Calkins, for appellants.

W. E. Higgins and G. R. Chaney, for appellee.

Concannon *et al.* v. Noble.

ELLIOTT, C. J.—An action was brought by the appellee against the appellants and George Sykes, and a judgment was rendered against all of the defendants in that action. The complaint in the present case seeks a review of that judgment, and the suit is prosecuted by the appellants alone. Their co-defendant in the former action is not made a party to the present suit, either as plaintiff or defendant. The complaint was attacked in the court below upon the ground, among others, that there was a defect of parties, and this point is vigorously pressed in this court.

The general rule unquestionably is, that all who were parties to the original action must be brought before the court on a bill to review. If they will not join as plaintiffs they may be brought in as defendants. *Sloan v. Whiteman*, 6 Ind. 434; *Douglay v. Davis*, 45 Ind. 493; *Burns v. Singer, etc., Co.*, 87 Ind. 541; Story Eq. Pl. 535; Mitford Eq. Pl. 89. The rule that all the parties should be brought before the court where a judgment is sought to be reversed on appeal, or reviewed and vacated by the court which rendered it, is not a technical rule, but is an important one substantially affecting the rights of the litigants. It is sometimes quite as important to one of several defendants as it is to the plaintiff, that the judgment should remain undisturbed, and in order that all may be heard it is proper and necessary that all the original parties should be brought into court on a bill to review. In *Hunderlock v. Dundee, etc., Co.*, 88 Ind. 139, the reasons supporting the rule that all parties must be before the court in cases of this character are very forcibly stated, and we do not think it necessary to again discuss the subject.

Judgment affirmed.

Filed June 20, 1884.

 Aufdencamp v. Smith.

No. 10,494.

AUFDENCAMP v. SMITH.

BILL OF EXCEPTIONS.—*Instructions.*—*Practice.*—Instructions to the jury, which have not been filed or directed by the court to be made part of the record, and are not in any proper bill of exceptions, are not a part of the record.

HARMLESS ERROR.—*Evidence.*—It is a harmless error to admit or reject evidence which can not affect the result.

From the Ohio Circuit Court.

H. D. McMullen and *D. T. Downey*, for appellant.

W. S. Holman, *W. S. Holman, Jr.*, and *J. B. Coles*, for appellee.

BICKNELL, C. C.—The appellee had a verdict against the appellant for \$500 for the breach of a marriage contract. The court overruled a motion by the appellant for a new trial, and rendered judgment on the verdict.

The appellant assigns as error the overruling of his motion for a new trial. The reasons alleged for the new trial are, that the verdict is not sustained by sufficient evidence and is contrary to law, error in excluding and admitting testimony, and in sustaining appellee's motion to suppress parts of a deposition, and in giving instructions to the jury.

The record presents no question as to the instructions, because it fails to show that they were filed or directed by the court to be made part of the record. *Hadley v. Atkinson*, 84 Ind. 64; *Heaton v. White*, 85 Ind. 376; *McIlrain v. Emery*, 88 Ind. 298. "Instructions, in order to be made a part of the record, * * must be filed as a part of the record, and the fact of such filing must be shown in the transcript." *O'Donald v. Constant*, 82 Ind. 212. *Nowlin v. Whipple*, 89 Ind. 490.

In this case, the original bill of exceptions, which was brought up by *certiorari*, contained no instructions, but in the record the clerk has left out a part of the original bill, and has inserted in its place, between the conclusion of the evidence and the signature of the judge, several instructions, commencing thus:

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| 96 | 326 |
| 124 | 340 |
| 96 | 336 |
| 146 | 444 |
| 96 | 326 |
| 164 | 438 |
| 96 | 328 |
| 165 | 242 |

Aufdecamp v. Smith.

"Anna M. E. Smith v. George Helfenkamp. Gentlemen of the jury:" There is nothing to show that these instructions were filed, and they are not entitled as of the cause from which this appeal was taken. The appellant procured a *certiorari*, from the return of which it appears that after this cause was submitted, the date of the submission being November 28th, 1882, the appellant, at the October term, 1883, of the Ohio Circuit Court, made an application to that court for the entry of a *nunc pro tunc* order in relation to the filing of said instructions, and that on such application the court made a special finding of the facts and entered thereon the following order as a conclusion of law, to wit:

"That the court made no order directing the filing of said charges, and that the defendant is not entitled to an order now for then directing the filing of said charges, and that the plaintiff recover her costs therein."

There is nothing in this proceeding that makes the record sufficient as to the instructions. The bill of exceptions contains the statement that it contains all the evidence given in the cause, but it shows upon its face that it does not contain the testimony of all the witnesses.

Upon such a bill of exceptions this court will not ordinarily consider whether the verdict is contrary to law or supported by sufficient evidence, or whether the damages are excessive. *Louisville, etc., R. W. Co. v. Henly*, 88 Ind. 535. In this case, however, we have examined the evidence set forth in the bill of exceptions, and we are satisfied that the cause was fairly tried upon its merits, and that a just result was reached.

The motion to suppress part of a deposition was properly sustained, because the matter suppressed was immaterial. The evidence alleged to have been improperly admitted was such that its admission or rejection could not have affected the verdict; the evidence rejected was immaterial; if admitted, it could not have changed the result. Section 658, R. S. 1881, contains the following: "Nor shall any judgment be stayed

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or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below."

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed June 19, 1884.

 No. 10,477.

POUDER v. TATE.

RECEIVER.—*Evidence.*—*Practice.*—*Mortgage.*—The Supreme Court will not, in an application for the appointment of a receiver in an action to foreclose a mortgage, disturb the conclusion reached by the trial court as to the sufficiency of the mortgaged property to discharge the debt.

SAME.—*Demurrer.*—It is not error to refuse to permit a demurrer to be filed to such an application.

SAME.—*Petition for Foreclosure.*—Where, in the foreclosure of a mortgage, the appointment of a receiver is asked, it is not essential to aver in the petition that the mortgagor is insolvent.

From the Hamilton Circuit Court.

G. W. Galvin, D. Moss and R. R. Stephenson, for appellant.

F. Knefler, J. S. Berryhill, B. Harrison, W. H. H. Miller,
and *J. B. Elam*, for appellee.

HAMMOND, J.—During the pendency of an action to foreclose a mortgage, executed by the appellant to the appellee, the latter procured the appointment of a receiver to take charge of the mortgaged premises and the rents and profits thereof pending the litigation. The appellee's petition asking the appointment of a receiver stated facts showing that the mortgaged property was not of sufficient value to discharge the mortgage, prior encumbrances and taxes. The petition was sustained by affidavits filed in its support, and was opposed

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| 96 | 355 |
| 122 | 370 |
| 96 | 380 |
| 133 | 50 |
| 96 | 330 |
| 139 | 472 |
| 96 | 330 |
| 156 | 563 |
| 96 | 330 |
| 159 | 81 |

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by affidavits filed in behalf of the appellant. Upon a question of fact thus presented, we can not disturb the conclusion reached by the trial court.

The appellant offered to file a demurrer to the appellee's petition for the appointment of a receiver, but was not permitted to do so. An application for the appointment of a receiver pending litigation is made upon petition or motion. Affidavits and counter affidavits may be filed, or oral testimony heard, and an exception taken to the sustaining or the overruling of such petition or motion presents the question of the correctness of the ruling. This, we think, is the correct practice.

It is claimed that as the insolvency of the mortgagor was not averred in the petition, the appointment of a receiver was unauthorized. This averment is not essential where, in the foreclosure of a mortgage, the appointment of a receiver is asked. In such case it is only required to show that the mortgaged property is not sufficient to discharge the mortgage debt. Section 1222, R. S. 1881, clause 4. This fact was plainly presented by the appellee's petition, and sufficiently sustained by affidavits filed in its support, to prevent this court from interfering with the action of the trial court in appointing a receiver.

Judgment affirmed, with costs.

Filed June 21, 1884.

No. 11,347.

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CRIMINAL LAW.—*Pleading.*—*Practice.*—*Indictment.*—*Information.*—Where, upon the quashing of an indictment, the prosecuting attorney, upon affidavit, files an information charging the same offence, no question as to the action of the court in quashing the indictment can be made in the Supreme Court.

SAME.—*Affidavit.*—*Signature of Affiant.*—*Name.*—*Plea in Abatement.*—A plea

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in abatement of an information, that the real name of the person who made the affidavit is not the name signed to the affidavit, that the affiant's true name is different (stating it), and that the name signed is fictitious, is bad on demurrer.

From the Sullivan Circuit Court.

F. T. Hord, Attorney General, *J. D. Alexander*, Prosecuting Attorney, *J. C. Briggs* and *C. E. Barrett*, for the State.
S. Coulson, for appellees.

ELLIOTT, J.—The court, upon the motion of the appellees, quashed the indictment which had been returned against them, and thereupon the prosecuting attorney filed an affidavit and information charging the same offence as that described in the indictment. In our opinion the filing of the information and affidavit superseded the indictment, and, like the amendment or substitution of pleadings in civil actions, rendered the rulings on the indictment immaterial. As the indictment was supplanted by an information, the ruling on the motion to quash presents no question requiring consideration from us.

The appellees filed what is called a plea in abatement, which, omitting the formal parts, is as follows: "Defendants say that said information is not founded upon and supported by a sufficient affidavit, in this, to wit, that no such person as Harry Blue, by whom the said affidavit purports to have been signed and sworn to, existed at the time said affidavit was signed and sworn to, or now exists, but, as these defendants are informed and believe, the same was signed and sworn to by one Henry Little, under the false and fictitious name of Harry Blue."

A plea of abatement requires the highest degree of certainty. 1 Bishop Crim. Proc. 745. In *Ward v. State*, 48 Ind. 289, it was said: "Answers in abatement are not favored in law. They must allege every fact necessary to their sufficiency. No presumptions of law or fact are allowed in their favor." If the plea before us is wanting in any material particular, it must be held bad. It will be observed

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that the plea alleges that an affidavit was made, so that there is no question as to the existence of an affidavit subscribed and sworn to by a real person. It is, however, averred that he signed a fictitious name, and it is claimed that this renders the affidavit insufficient. We think this position untenable. For aught that appears the name signed may have been that by which the affiant was commonly known, although his true and legal name may have been Little. Where the person is clearly identified, and it appears that there was an actual signing and verification, the affidavit should be upheld unless the plea affirmatively shows that the signing was by a name different from that by which the affiant was commonly known, or else shows that a fictitious name was used for a corrupt purpose. The object of the law is accomplished when an affidavit is actually made by a real person, and the name used is not material, provided it is one by which the affiant is commonly known, or is a name which supplies the means of identifying him. As presumptions are against, and not in favor of, such dilatory pleas as the one under immediate discussion, we must presume that, as the affidavit was signed and sworn to by a real person, the name used is one which identifies and designates the person by whom the affidavit was made.

The court erred in overruling the demurrer to the plea, and the judgment is reversed, at the costs of the appellees.

Filed April 18, 1884. Petition for a rehearing overruled June 21, 1884.

No. 11,489.

COLES ET AL. v. PECK.

SUPREME COURT.—*Jurisdiction.*—*Amount in Controversy.*—*Appeal.*—On appeal to the Supreme Court of a case commenced before a justice of the peace, the amount in controversy is determined not alone by the complaint, but also by any set-off or counter-claim, and if it thus appears that there is more than \$50 in controversy, the appeal will lie under section 632, R. S. 1881.

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LEASE.—Renewal or Purchase.—Election.—Specific Performance.—Equity.—A lease of a lot for a term provided for the erection of a building on the lot by the lessee, and at the end of the term, the lessor could elect to renew the lease, or buy the building, or sell the lot, at a price to be ascertained by referees; the lessor failed to elect.

Held, that the lessee could then elect, and, having chosen to purchase the lot, and the lessor refusing to join in a reference to fix the price, could maintain suit against the lessor for equitable relief.

From the Ohio Circuit Court.

A. C. Downey, for appellants.

J. S. Jelley, for appellee.

NIBLACK, J.—On the 6th day of March, 1873, Eliza Peck, by an instrument in writing, mutually executed, leased to Reece N. P. Buchanan and James Buchanan, a lot of ground in the city of Rising Sun, for a period of ten years at the rate of \$50 per year, payable annually in advance, the term to commence on the 10th day of March, 1873, and end on the 10th day of March, 1883, and the lessees to have the privilege of erecting on the lot, and occupying during their term, a two-story brick house, suitable for business purposes. The instrument contained the following additional provisions:

“And it is further agreed between said parties, and made part of the conditions of this lease, that at the expiration of the same the said lease is to be renewed and continued for another term of time of ten years on the same terms, that is to say, \$50 per year, or the party of the first part is to purchase the building and improvements from the party of the second part, or the party of the second part is to purchase the grounds. Either one of the three is to be done, and that at the option of the party of the first part, and she shall notify the other party twelve months before the expiration of the time which one she will elect to do. And in case the lease is not renewed, and a sale is to take place as in either case above named, then each party is to choose a competent disinterested freeholder who shall appraise the value of the ground or building, as the case may be, and they shall have

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power, in case they see proper to choose a like third person, and the party who is to purchase shall pay to the other the amount so stated by them to be the value. And if this lease is renewed for the second term of ten years, then at the expiration of that time sale from one to the other shall be made as above stated, either the land to the party of the second part or the building to the first party, to be determined as above set forth. And all the terms, covenants and conditions of this lease shall extend to the heirs, administrators, executors or assigns of the parties to the same."

The Buchanans went immediately into possession and soon thereafter erected on the leased lot a two-story brick building of the value of \$3,000. During the year 1877 all the interests and the estates of the Buchanans in the lease were assigned and transferred to John B. Coles and Daniel S. Wilber, who very soon went into and have ever since continued in possession of the leasehold premises.

On the 20th day of March, 1883, Eliza Peck, the lessor, commenced this action against Coles and Wilber by filing a complaint against them before a justice of the peace for the sum of \$50, as the amount alleged to be due in advance for rent of the leased lot from the 10th day of March, 1883, to the 10th day of March, 1884. Coles and Wilber appeared before the justice and answered: *First.* In general denial. *Second.* By way of cross complaint, setting up the lease and the matters connected with it herein above referred to, and averring the performance of all the covenants and conditions of the lease on their part; also averring that the plaintiff failed to elect whether she would renew the lease, or purchase the building on the leased ground, or sell the ground to the defendants, and to notify the defendants of her election in the premises twelve months before the expiration of the term of the lease, or at any other time; that on the 3d day of February, 1883, they, the defendants, elected to purchase the leased ground, and so notified the plaintiff; that they thereupon selected Richard M. Jones, a competent and disinter-

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ested freeholder of said city of Rising Sun, as an appraiser to appraise said leased ground, fixing the time for said appraisement for the 10th day of March, 1883, and the place at the front door of the building on the leased ground, of all which they notified the plaintiff in writing on said 3d day of February, 1883; that on the 10th day of March, 1883, the said Richard M. Jones appeared at the time and place named in the above mentioned notice in writing, but the plaintiff failed and refused to select any person on her part to appraise the leased ground which the defendants had so elected to purchase; that the plaintiff so failing and refusing, the defendants immediately selected George B. Gibson, also a competent and disinterested freeholder of the city of Rising Sun, to act also as an appraiser of the leased ground in question; that the said Jones and Gibson then and there proceeded to appraise said leased ground, and appraised the same at \$322, of which they at once gave notice in writing both to the plaintiff and defendants; that after receiving notice of such appraisement, that is to say on said 10th day of March, 1883, the defendants tendered to the plaintiff, and offered to pay her, in legal tender United States treasury notes, said sum of \$322, on condition that she would make and deliver to them a good and sufficient deed of conveyance for said leased land, but the plaintiff refused to accept said sum of money as well as to execute such a deed; that the defendants were ready and willing to pay said sum of money on the condition of receiving a deed, and would pay the money into court at any time when required so to do, as a means of obtaining a specific performance of the contract contained in the lease. Wherefore the defendants demanded a specific performance of said contract, and damages in the sum of \$3,000, as well as all other proper relief.

The justice certified the cause to the circuit court, upon the ground that the matters alleged in the cross complaint put in issue the title to real estate.

In the circuit court a demurrer to the cross complaint was

sustained, and a trial resulted in a finding and judgment for the plaintiff in the sum of \$50.

Error is first assigned upon the decision of the circuit court sustaining the demurrer to the cross complaint; but as preliminary to the consideration of the question of the sufficiency of that pleading, the appellee has moved to dismiss this appeal, upon the ground that the action was commenced before a justice of the peace, and that the amount in controversy below did not really exceed \$50.

In determining the amount in controversy upon an appeal to this court in a cause originating before a justice of the peace, we must look to the set-off, counter-claim or cross complaint as well as to the complaint. *Shriver v. Bowen*, 57 Ind. 266; *Bowlus v. Brier*, 87 Ind. 391.

Taking into consideration the cross complaint as well as the complaint in this cause, we find much more than the sum of \$50 in controversy. The motion to dismiss this appeal can not, therefore, be sustained.

The facts alleged in the cross complaint present some more novel and much more difficult questions. The first is: Did the failure of the appellee to avail herself of the option reserved to her in the lease transfer to the appellants the right to exercise a similar option on their part?

Viner, in his General Abridgment, in volume 9, on page 362, says: "If a man sells trees growing upon his land, excepting six oaks, the exceptor is to have the election, and if there be a time limited, he must do it during such time, but if he slip the time, then the other shall elect." Story on Contracts, at section 816, in treating of alternative contracts, concludes: "But if the person, by his own wrong or default, lose his election,—as if he be bound, in the alternative, to do one of two things by a certain day, and he suffer the day to pass, without making an election by performing one or the other, the other party may elect which he will demand." Bouvier, in his Institutes, volume 1, section 693,

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holds a similar doctrine, saying: "The right to choose which of two things is to be delivered to fulfil an alternative obligation, called the *right of election*, is vested in the party to whom it is given by the agreement; but when there is no one selected to exercise this right, it belongs to the first agent, or he who is to do *the first act*, and on his failure to exercise it in proper time, the right passes to the other party."

From illustrations given and various exceptions noted, the doctrine of these extracts is only applicable to alternative obligations which are distinctly disjunctive, and not to cases in which the law, or the evident intention of the parties, implies an election. As thus distinguished, this doctrine is, to a greater or less extent, supported by the cases of *Duerson v. Bellows*, 1 Blackf. 217, *Conwell v. Smith*, 8 Ind. 530, and *Ireland v. Montgomery*, 34 Ind. 174, and may, as we believe, be safely applied to the alternative reservations contained in the case before us. Consequently, when the appellee failed to exercise her right of election, under the lease, her right in that respect passed over to the appellants.

The next question is, did the appellants properly proceed in the appraisalment, or attempted appraisalment, of the leased ground?

A learned author states the law in cases analogous to this, to be that "Where a lease stipulated that at the close of the term the value of the building should be appraised by persons to be chosen by the parties, and that the lessor should purchase the buildings of the lessee at the price so set by the appraisers, it was held, that before the lessee could sue for the value of the buildings he must show that he had done all that was reasonably in his power to have the appraisalment made; that having shown this, and that his efforts had been vain, he might then sue for the fair value. * * * The duty of procuring the decision of the referee in cases like the foregoing rests primarily upon the party who will have the claim for payment; i. e., upon the plaintiff in the suit to be brought after the right of action shall have accrued. He

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must use his best exertions to bring about and perfect the agreement of reference. And it seems that his failure to bring it about will enable him to institute suit without delay, only in case the obstacle to his success has grown out of the contumacious action of the other party. The debtor can not, by preventing the perfection of the reference, escape the liability to be sued." Morse Arb. & Award, '94.

As to the proper remedy to be pursued in cases similar to, or of the general class of, the one made by the cross complaint in this case, there is some conflict in the authorities.

In the case of *Milnes v. Gery*, 14 Vesey Jr. 400, which has become a leading case of its class, it was held that where a sale was provided for in a lease at a price to be fixed by two persons to be mutually chosen, or by an umpire to be appointed by the persons so chosen in case of disagreement, and where the appraisers failed to agree upon the price, or the person to be appointed as umpire, a bill would not lie for a specific performance of the contract of sale, upon the ground that the contract was incomplete and inoperative until the price was determined according to the provisions of the lease, and that case has been followed by some cases in this country, notably those of *Greason v. Keteltas*, 17 N. Y. 491, and *Hopkins v. Gilman*, 22 Wis. 476, holding that for the wrongful failure to complete an agreement for reference, the proper remedy was by action at law for the recovery of damages. The doctrine of that case has, however, generally been followed by the courts of the United States, only in a limited and restricted sense, and is mainly applied only to contracts for reference in which, by the form and language of the stipulation, the mode of determining the price by values, on arbitration, is made an essential provision—in fact condition—to the validity of the agreement, and to cases in which the parties can be easily placed *in statu quo*, or where an action for damages can be made to afford an adequate remedy.

There is another recognized class of contracts providing a

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mode for ascertaining the price of property by arbitration or reference, in which the language used in the stipulation is treated as non-essential, and as more in the nature of a suggestion, regarding the stipulation itself as virtually an agreement to sell the property at a fair price.

Concerning this latter class of contracts, Pomeroy in his work on the Specific Performance of Contracts, says:

“If the means specified for fixing upon the price fail for any reason, the court does not treat the contract as fatally defective; but will, in the suit for a specific performance, direct a fair and reasonable price to be ascertained in some manner preliminary to the decree, either by referring the matter to a master or other officer, or by appointing a skilled person as a special valuer, or even by determining the amount itself; it will pursue any such mode as the circumstances of the case show to be expedient. The tendency of the later English decisions is to consider these stipulations for a determination of the price by third persons, rather as matters of form than of substance; to construe them in such manner that they become incidental only to the main object of the agreement. * * The result is, that while the doctrine of *Milnes v. Gery*, and of the class of cases to which it belongs, has not been repudiated, and is even now enforced, yet it is carefully restricted to the kind of contracts already mentioned; the court will treat the contract as falling within the second class, unless it would thereby do violence to the language and thwart the plain intent of the parties.” Sections 148–152, and notes.

Waterman, in his treatise on Specific Performance, states the rule to be that “Specific performance can not be enforced of an agreement that property shall be sold at a price to be determined by valuers, if no valuation be made; nor the appointment of valuers decreed, or any other mode of determining the price be substituted by the court, unless there has been such acquiescence in, or part performance of, the contract, as would render it inequitable not to enforce its execu-

tion, in which case the court will determine what is a fair value." Wat. Spec. Per., section 44.

In Wood on Landlord and Tenant, pp. 673-4, it is said: "Where the lease contains a covenant for the renewal of a lease, on a valuation or appraisal by arbitrators, and the lessor will not comply with the terms of the covenant, and agree upon arbitrators or submit the matter to them, a court of equity will not decree a specific performance of that part of the covenant, but will receive evidence of the value, and compel the execution of a lease as agreed. * * * If the arbitration fails by reason of the arbitrators chosen being unable to complete the reference, and the parties failing to agree on another umpire, the lessee may maintain an action of an equitable nature to compel the execution of a renewal lease, and have a reference to ascertain what the amount of rent should be."

In the case of *Tscheider v. Biddle*, 4 Dillon, 55, a case very similar to the one at bar in many of its essential facts, the court stayed the proceedings in an action at law for the collection of rent until the lessor should appoint an appraiser to value the land in accordance with the terms of the lease.

As bearing on the same general subject, reference is made to the following cases: *Lowe v. Brown*, 22 Ohio St. 463; *Tobey v. County of Bristol*, 3 Story, 800; *Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burkleo*, 58 Mo. 202.

The weight of American authority unmistakably supports the conclusion that in cases of the same general character as this, equity will take jurisdiction and grant such relief as may seem to be most expedient, or most in accord with the spirit of the agreement looking to the sale of the property.

We do not hold that the report of the arbitrators chosen by the appellants in this case is conclusive upon the appellee as to the value of the leased lot. We hold only that the averments of the cross complaint are sufficient to show that the appellants have done all that they reasonably could do to

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consummate the agreement for reference contained in the lease, and have, for that reason, presented a good *prima facie* case for equitable relief. *Strohmaier v. Zeppenfeld*, 3 Mo. Ap. 429. See, also, *Lowe v. Brown*, *supra*; *Hall v. Warren*, 9 Ves. Jr. 605; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *Dinham v. Bradford*, L. R., 5 Ch. Ap. 519; *Richardson v. Smith*, L. R., 5 Ch. Ap. 648; *Gregory v. Mighell*, 18 Ves. Jr. 328; *Jackson v. Jackson*, 19 Eng. L. & E. 545; *Dunnell v. Keteltas*, 16 Abb. Pr. 205; *Arnot v. Alexander*, 44 Mo. 25; *Biddle v. Ramsey*, *supra*; *Kelso v. Kelly*, 1 Daly, 419; *Backus's Appeal*, 58 Pa. St. 186; *Norris v. Jackson*, 3 Giff. 396; *Parker v. Taswell*, 2 De G. & J. 559; *Jackson v. Jackson*, 1 Sma. & Giff. 184.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

Filed June 24, 1884.

No. 11,185.

POUNDS ET AL. v. CHATHAM.

EXECUTION.—*Proceedings Supplementary.*—*Affidavit.*—*Fraud.*—*Contract.*—An affidavit in supplementary proceedings under section 819, R. S. 1881, which charges that A. P. is indebted to the judgment debtor in the value of certain lands conveyed by the former to the latter, presents no question of fraud, and proof of such conveyance in consideration of an agreement by A. P. to pay certain other debts of the debtor and to support him during life, does not support the conclusion that A. P. is indebted in a sum equal to the value of the lands, as charged.

SAME.—*Judgment.*—*Appeal.*—An appeal lies from a judgment in such case requiring A. P., unless he at once reconvey the land, to pay to the judgment plaintiff the amount found to be the value of the land.

From the Hendricks Circuit Court.

L. A. Barnett, — *Wilson* and — *Wilson*, for appellants.

L. M. Campbell, for appellee.

HAMMOND, J.—This was a proceeding supplementary to execution under section 819, R. S. 1881.

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The appellee's affidavit was as follows:

"BARBARA A. CHATHAM v. JOSEPH B. POUNDS.

"Affidavit for Proceedings Supplementary to Execution.

"The plaintiff, Barbara A. Chatham, being sworn, says on oath, that she has a judgment rendered in this court against said defendant, on the 16th day of June, 1883, for \$1,942 and costs of said suit, amounting to \$8.25, upon which she caused execution to issue, June 27th, 1883, and which execution has been returned by the sheriff of this county unsatisfied, said defendant claiming that he had no property. Affiant says that said Joseph B. Pounds resides in Hendricks county, and is not a householder, and that she is informed and believes said defendant recently, and only about three months since, had one hundred and sixty acres of land in Lyon county, Kansas, of the value of \$2,000, which he conveyed to his brother, Archibald P. Pounds, and that he also had a lot of bees of the probable value of \$40, the proceeds of which he unjustly refuses to apply on plaintiff's debt, or toward the satisfaction of said execution. And affiant further believes that said Archibald P. Pounds is indebted to the defendant, Joseph B. Pounds, in the value of said Kansas land or a material part thereof, or that he holds property of said Joseph B. Pounds, which should be applied on plaintiff's debt, and is not exempt from execution. Wherefore she prays that an order be issued requiring both said Joseph B. Pounds and Archibald P. Pounds to appear forthwith before this court, to be examined under oath in relation thereto, and to answer concerning the same."

The court, at the request of appellee, after the examination of the parties, made a special finding of facts, stating its conclusions of law thereon, which were as follows:

"The court finds that the plaintiff recovered a judgment against the defendant, Joseph B. Pounds, on the 16th day of June, 1883, for \$1,942 and \$8.25 costs of said suit, on which execution issued June 27th, 1883, which was returned unsatisfied June 29th, 1883, and is still unpaid; that said Joseph

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B. Pounds is a resident of Hendricks county, Indiana, and not a householder; that he has no property in said county of any value, except four stands of bees, worth \$40; that on the 8th day of March, 1883, said Joseph B. Pounds conveyed by deed upon its face, to said Archibald P. Pounds, the following described lands in Lyon county, Kansas: The W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ of section 33, township 18, range 10 east, which deed was recorded in said county of Lyon, March 14th, 1883; that said Archibald P. Pounds paid no consideration therefor whatever; that said Archibald P. Pounds executed to said Joseph B. Pounds at said date, March 8th, 1883, a written undertaking to maintain said Joseph B. Pounds, during his life, with a condition therein expressed that said deed should be void if the undertaking of said Archibald was not kept, and a further agreement that said Archibald should assume the payment of \$110 due other parties from said Joseph, which debts have not been paid; the value of said land is not satisfactorily proven, but it is estimated to be worth about \$1,000. The court further finds that said Joseph B. Pounds had been indebted continuously for more than ten years to the plaintiff, in sums varying from \$700 to \$1,900, and that he had been repeatedly requested to pay the same for several years; that on March 8th, 1883, he had no other property of any value, except the land in Kansas as above described, and that one object of said conveyance was to hinder and defeat the collection of plaintiff's debt; that Archibald P. Pounds had full notice of the indebtedness of said Joseph to plaintiff before and when said deed was made, and that said deed was fraudulent and void as to said plaintiff. On the above facts, the court concludes the law to be that it has no jurisdiction to adjudge or decree in relation to said Kansas land; that said Archibald P. Pounds is liable to the plaintiff in value of said land, to wit, \$1,000."

The appellants excepted to the conclusions of law, and, over their motion for a new trial, the court rendered judgment as follows:

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"It is therefore ordered by the court that unless said Archibald P. Pounds reconvey said land at once to said Joseph B. Pounds, he shall pay into court for the use of said plaintiff \$1,000 on or before July 17th, 1883, and on failure to do so he shall be held and adjudged to be in contempt of this court."

It will be observed from the affidavit that so far as Archibald P. Pounds was concerned, the substantial charge of the affidavit is that he was indebted to said Joseph B. Pounds in the value of the Kansas lands. Whether the appellee could, in any action, recover of Archibald the value of the said lands is a question not before us. The only question that the court below had to decide from the evidence upon the appellee's affidavit was whether said Archibald was indebted to said Joseph on account of the conveyance of said lands. The only fact found upon this point was that Archibald executed to Joseph a written undertaking to maintain said Joseph during his life, but the conclusion of law does not base the appellee's right to recover upon the value of said undertaking, for its value was not found, but such right to recover was wholly predicated upon the value of the Kansas lands. It is manifest that in an action by Joseph against Archibald upon account of his conveyance to the latter of said lands, he could not, upon the facts specially found, recover the value of such lands. Archibald was not indebted to Joseph for such value, but his obligation was confined to his written undertaking to maintain Joseph. Whether any question of fraud could be adjudicated in a case like the present need not be decided. It could not in the present action for the reason, if for no other, that there was no averment of fraud in the appellee's affidavit, which must be taken as the statement of her cause of action.

The assumption by Archibald, as part consideration for the conveyance, of the payment of \$110 due from Joseph to other parties was binding upon Archibald. *Rardin v. Walpole*, 38 Ind. 146; *Josselyn v. Edwards*, 57 Ind. 212. This amount

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was not owing by Archibald to Joseph, but to the persons in whose favor its payment was assumed. It could not, therefore, be appropriated in favor of the appellee.

The appellee insists that an appeal did not lie in this case, and that it should be dismissed. A proceeding supplementary to execution is an independent action relating to, but no part of, the original case in which the judgment was rendered which is sought, by such proceeding, to be collected in whole or in part. The judgment of the court in the present case, we think, was final so as to authorize an appeal. Section 632, R. S. 1881. But if the judgment is to be regarded as only interlocutory, an appeal would lie from it, as it required the payment of money. Section 646, R. S. 1881.

The judgment is reversed, at the appellee's costs, with instruction to the court below to restate its conclusions of law in favor of the appellants, and to render judgment accordingly.

Filed June 24, 1884.

No. 11,104.

THE TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY v. BUCK, ADMINISTRATRIX.

NEGLIGENCE.—*Railroad.—Carriers of Passengers.—Injuries Resulting in Death.*

—*Proximate Cause.*—Where an injury to a passenger, caused by the negligence of the carrier, is such as to render the system of the injured man liable to take on disease and to so enfeeble the system as to make it less likely to resist the inroads of the disease when it does set in, and death results, the death is, in legal contemplation, attributable to the negligence of the carrier.

SAME.—*Intervening Agency.*—Where the result of an injury is such as might have been expected to occur in the ordinary or natural course of events, the carrier is not relieved from responsibility although there may have been some intervening agency contributing to the result.

SAME.—*Duties.—Degree of Care Required.*—A carrier of passengers is held to the exercise of the highest degree of care to secure the safety of passengers, and is liable to a passenger who is himself without fault, for an omission or failure to exercise this care.

SAME.—*Duty to Stop Trains at Stations.*—A carrier of passengers is bound to

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| 96 | 346 |
| 138 | 421 |
| 96 | 346 |
| 141 | 551 |
| 143 | 130 |
| 96 | 346 |
| 146 | 668 |
| 96 | 346 |
| 152 | 670 |
| 96 | 346 |
| 155 | 95 |
| 96 | 346 |
| 157 | 420 |
| 96 | 346 |
| 163 | 364 |
| 163 | 385 |
| 96 | 346 |
| 164 | 423 |
| 164 | 424 |
| 96 | 346 |
| 165 | 60 |
| 96 | 346 |
| 166 | 371 |
| 168 | 409 |

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provide reasonably safe places for passengers to alight from trains, and is bound to stop at regular stations for a sufficient length of time to permit passengers, using reasonable care, to alight with safety.

SAME.—*Invitation to Alight.*—Bringing a train to a full stop near the regular station, after having given the usual signal indicating the arrival at the station, is an implied invitation to the passenger to alight.

SAME.—*Contributory Negligence.*—A passenger is not necessarily guilty of contributory negligence, who, without knowledge of the dangerous place at which a train has stopped, and in a dark night, steps from a train which has been brought to a full stop, near the usual stopping place, at the regular time for stopping, and after the customary signal for stopping has been given.

SAME.—*Presumption of Negligence.*—*Burden of Proof.*—Where a railroad train is run past a regular station, and brought to a full stop on a dangerous trestle-work, the presumption is that there was negligence, and the burden is cast upon the carrier of showing that there was not.

From the Montgomery Circuit Court.

J. G. Williams, B. Harrison, W. H. H. Miller and J. B. Elam, for appellant.

G. W. Paul, M. D. White and J. E. Humphries, for appellee.

ELLIOTT, J.—On the night of December 9th, 1881, the appellee's intestate, Andrew J. Buck, took passage on one of the appellant's passenger trains at the town of Darlington for the station of Sugar Creek, not far distant. Both these places were regular stations of the company, at which passengers were received and discharged, and the train on which the deceased took passage stopped at Sugar Creek. About the time the train usually arrived at this station, and at the place where the signal whistle for the station was usually sounded, the engineer caused the customary signal to be given, and applied the brakes, but the brakes did not stop the train, and it ran by the station and was stopped on a trestle bridge, three hundred and eighty-five feet beyond the usual stopping place. The deceased stepped from the car in which he was sitting and fell through the bridge, a distance of nineteen feet, and struck upon the rocks which formed the bed of the stream spanned by the trestle-work. The night was dark, and there

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were no lights about the place where the train was stopped, and the length of the stop was about that ordinarily made at small passenger stations. The regular station was a safe place to alight, and the deceased lived not far distant, and was acquainted with the station and its surroundings. The station had not been called at the time the deceased left the train, but there was evidence showing that it was not the custom of the railroad company's employees to call the name of the station.

The deceased was found in the creek, and, if not delirious when first reached, very soon became so, and was taken to a house near by. It was not far from eight o'clock when he fell from the trestle-work, and the physician who reached him at half-past ten o'clock thus describes his condition: "I found him lying upon the bed on his left side, his head somewhat elevated, his body in a perspiration, right leg drawn up, left extended; there was a cut on his chin—on the left side—it was about an inch and a half long; his left ankle was swollen, blood clot on either side, and there was a bruise on his back, low down; his eyes were closed, one of the pupils of his eyes was larger than the other, one dilated and the other contracted; he seemed to be suffering pain, groaning and crying, and asking 'Where am I?' 'What has happened?' 'Where is Bess?' that is the name by which he called his wife; his sense of hearing seemed to be not acting, as he would not respond to questions except by a groan." The witness then stated that he took the temperature of his patient's body, and stated the result of his examination in detail. Visits were made on the 10th, 11th and 14th days of December, and the deceased was still suffering from the pain in his head. In answer to a question, the physician said: "He was suffering from what we call a concussion of the brain; it continued until January 14th, 1882, the day of his death." A visit was made on the 16th day of December, and from that time visits were made daily, and oftener until the death of the patient. A graphic description of the progress of the case was read from a book called "The Physician's Case Book,"

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and from this testimony it appeared that the pain in the head and the surgical fever found present on the 10th day of December continued until the end, but that typho-malarial fever had supervened, and that the immediate cause of death was hemorrhage from the bowels. The medical witness was asked on cross-examination how the injury contributed to the death of his patient, and he answered: "By receiving a fall on the 9th of December, and in that fall receiving a concussion of the brain. There was a condition of the brain in which his nervous system was affected, and by the sprained ankle which confined him to his bed; and the injury under his jaw and on his back, by confining him to his bed, put his system in a favorable condition to take on disease—whatever the disease prevailing in the community might be, and the result of his being confined to his bed and the surgical fever he had following these injuries. He gradually drifted into malarial troubles, which were then rife in our community. The shock that his nervous system had received, and the depressing influence it had upon his system, had rendered it less able to bear the continued fever and typho-malarial fever, and this surgical fever put him in a condition to take on malarial fever, and the result of this malarial fever was hemorrhage of the bowels, from which he died." At another place in his testimony, the witness said that the injuries did, in one sense, produce the fever which resulted in death. Dr. Hopper, another physician, testified that he visited the deceased on the 11th day of January, and, in answer to an interrogatory, gave it as his opinion "That the fall contributed to his death—the injuries received from falling off the trestle." It was proved that the malarial fever was epidemic in the vicinity of Sugar Creek station, and that the deceased, prior to the fall from the trestle-work, was in robust health.

The contention of the appellant is that the evidence does not show that the injuries received by Andrew J. Buck, caused his death.

In order to discover a principle which will lead to a just

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decision of the question here confronting us, it will be necessary to reason from analogous cases, for we have found no case precisely in point, nor have we found in any text-writer a rule which governs such a case as this. A long settled rule of the common law, adopted and enforced in criminal cases, supplies a close analogy. One of the most philosophical of our law-writers thus states this ancient rule: "Now these propositions conduct us to the doctrine, that, whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed either mediately or immediately to the death, in a degree sufficient for the law's notice." 2 Bishop Cr. L., section 637. At another place this author says: "And the wound need not even be a concurrent cause; much less need it be the next proximate one; for, if it is the cause of the cause, no more is required." 2 Bishop Cr. L., section 639. The greatest names among the sages of the law are arrayed in support of this doctrine. 1 Hale P. C. 428; 1 Hawk. P. C. 93. It is sustained by the English, American and Prussian courts. It is the law of this State as declared in at least two cases, one of which was well discussed. *Kelley v. State*, 53 Ind. 311; *Harvey v. State*, 40 Ind. 516. If it is sufficient to show in cases where life and liberty are involved that the wrong was the "mediate cause," it must surely be sufficient where nothing more than money is involved.

In close agreement with the fundamental principle of which we have just spoken is the doctrine of the court in *Jeffersonville, etc., R. R. Co. v. Riley*, 39 Ind. 568, where it was held that the trial court properly refused to instruct the jury, in an action like this, that "the injury complained of can not be regarded as the proximate cause of death, if the deceased had a tendency to insanity and disease, and the injury received by him, producing his death, would not have produced the

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death of a well person." Straight in line with our own case is that of *Drake v. Kiely*, 93 Pa. St. 492. In that case a lad was taken against his will on a freight train and carried a distance of five miles, he returned home on foot, running most of the way, became ill and the ultimate result was that he became crippled in both legs, and it was held that the defendant was liable for all the injuries received. The court said the true rule is that the proximate cause must be determined by the jury upon all the facts in the case.

If we were to undertake to declare any other rule than that stated in the case cited, we should be involved in inextricable confusion, for it is clear that the passenger who suffers, as the appellee's intestate did, injuries of a serious character is entitled to some damages, and it is impossible for any one to pronounce, as matter of law, at what point the injury flowing from the wrong terminated. The only possible practical rule is that the wrong-doer, whose act is the mediate cause of the injury, shall be held for all the resulting damages, and that the question of whether his wrong was the mediate cause is one for the jury. But there are other cases sustaining the doctrine of this court. In *Ginna v. Second Avenue R. R. Co.*, 8 Hun, 494, affirmed on appeal, 67 N. Y. 596, the plaintiff received an injury through the negligence of the railroad company, which resulted in the development of a poisonous discharge causing death, and the company was held liable. It was there said: "More attentive treatment might have saved the life of the young man, but its necessity was not apparently suspected. He was subjected to that which was followed and designed to be proper by the wrongful act of the defendant. That was the cause which placed his life in jeopardy, because it produced the wound whose poisonous discharges resulted in his death." So it may be justly said of this case; it was the wrongful act of the appellant which placed the intestate's life in jeopardy. He who wrongfully places another's life in jeopardy is responsible for the loss of that life; the appellant did place the intestate's life in

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jeopardy, and is, therefore, responsible. The case of *Brown v. Chicago, etc., R. W. Co.*, 54 Wis. 342, S. C., 41 Am. R. 41, is strongly in point, and contains an exhaustive review of the authorities. In that case a pregnant woman was carelessly directed by a brakeman to leave the train at a point three miles short of her station, and she walked to her destination. This walk brought on miscarriage and illness, and it was held that for these consequences the carrier was responsible. Many cases are cited in support of this ruling. A like decision was rendered in *Houston, etc., R. R. Co. v. Fredericka*, by the Supreme Court of Texas, see 41 Am. R. 56, n, and in *Fitzpatrick v. Great Western R. W. Co.*, 12 U. C. Q. B. 645, a similar ruling was made. In *Brown v. Chicago, etc., R. W. Co.*, *supra*, it was said of *Pullman, etc., Co. v. Barker*, 4 Col. 344, S. C., 34 Am. R. 89, that it is "unsustained by authority." The decision in *Sauter v. New York, etc., R. R. Co.*, 66 N. Y. 50 (23 Am. R. 18), is that the representatives of one injured through the negligence of a railroad company are entitled to recover damages caused by his death, although the immediate cause of death was the mistake of the surgeon who treated him. In *Williams v. Vanderbilt*, 28 N. Y. 217, the carrier's negligence caused a passenger to be detained several weeks on the Isthmus of Panama, where he contracted a local fever, which disabled him for a long time after his return to New York, and this resulting injury was held a ground of recovery. A man by a wrongful act frightened a woman and caused her to flee from her house. In her flight she fell from a fence, and a miscarriage and illness resulted, and the defendant was held liable for this consequential injury. *Barbee v. Reese*, 60 Miss. 906. In the same line, but not quite so closely analogous, is the case of *Pennsylvania Co. v. Hoagland*, 78 Ind. 203 (approved in *Lake Erie, etc., R. W. Co. v. Fix*, 88 Ind. 381 (45 Am. R. 464), and *Louisville, etc., R. R. Co. v. Kelly*, 92 Ind. 371), where it was held that damages were recoverable for illness caused by exposure to cold re-

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sulting from carelessness in directing a passenger to alight at the wrong station.

It will be found on investigation that the decisions we have referred to are really members of an old and long established class of cases going back as far at least as the case so famous in the books as the "Squib Case." They do no more than apply a well known principle to new and peculiar instances. This general doctrine is well stated in *Baltimore, etc., R. R. Co. v. Reaney*, 42 Md. 117, where it was said: "The law is a practical science, and courts do not indulge refinements and subtleties, as to causation, that would defeat the claims of natural justice. They rather adopt the practical rule, that the efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned." At another place in the same opinion it is said: "To entitle such party to exemption, he must show not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done. *Davis v. Garrett*, 6 Bing. 716." In a recent work it is said: "Any wrongful act which exposes one to injury from rain, heat, frost, fire, water, disease, the instinctive or known vicious disposition or habits of animals, or any other natural cause, under circumstances, which rendered it probable that such an injury will occur, is a primary, efficient and proximate cause, if the injury ensue. Many such cases have been referred to in the preceding pages." 1 Sutherland Dam. 62.

In *Byrne v. Wilson*, 15 Irish C. L. 332, a stage-coach in which the plaintiff's intestate was a passenger was thrown into a canal by the negligence of the driver, and the lock-keeper turned on the water, thereby causing the death, by drowning, of the passenger, and it was held that the proprietor of the coach was liable under Lord Campbell's act, the court saying: "The precipitation of the omnibus into the lock was

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certainly one cause, and (as it may be said) the primary cause of her death, inasmuch as she would not have been drowned but for such precipitation. It is true that the subsequent letting of the water into the lock was the other and more proximate cause of her death, and that she would not have lost her life but for such subsequent act, which was not the necessary consequence of the previous precipitation, by the negligence of defendant's servants. But, in my opinion, defendant is not relieved from liability for his primary neglect, by showing that but for such subsequent act the death would not have ensued." The Chief Justice, in his opinion, said: "The law is clear that every party is liable, not only for the immediate consequences of his negligence, but also for the resulting consequences of his acts, whether those acts are acts of violence, or of negligence in breach of a duty which imposed the necessity of care and caution upon him." Proceeding upon the general rule we have stated, the court, in *Eaton v. Boston, etc., R. R. Co.*, 11 Allen, 500, said: "And it is no answer to an action by a passenger against a carrier, that the negligence or trespass of a third party contributed to the injury." * A like ruling was made in *Spooner v. Brooklyn City R. R. Co.*, 54 N. Y. 230.

The case of *Hatchell v. Kimbrough*, 4 Jones L. (N. C.) 163, supplies an instructive illustration of the rule. There a roof was removed from a house and the eye of the plaintiff was lost in consequence of the exposure resulting, and the defendant was held liable. The general rule is recognized and enforced by our own cases. *Billman v. Indianapolis, etc., R. R. Co.*, 76 Ind. 166, S. C., 40 Am. R. 230; *City of Crawfordsville v. Smith*, 79 Ind. 308 (41 Am. R. 61); *Binford v. Johnston*, 82 Ind. 426, S. C., 42 Am. R. 508; *Dunlap v. Wagner*, 85 Ind. 529 (44 Am. R. 42); *Louisville, etc., R. W. Co. v. Krimming*, 87 Ind. 351.

We turn now to the cases cited by the appellee. We have already shown by the quotation made from the able opinion in *Brown v. Milwaukee, etc., R. R. Co.*, *supra*, that the case

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of *Pullman, etc., Co. v. Barker*, 4 Col. 344, is not sustained by authority, and we now add that it can not be supported on principle. The cases of *Krach v. Heilman*, 53 Ind. 517, and *Collier v. Early*, 54 Ind. 559, were shown in *Dunlap v. Wagner*, 85 Ind. 529, to be in conflict with the cases of *Schlosser v. State, ex rel.*, 55 Ind. 82, *Fountain v. Draper*, 49 Ind. 441, *Barnaby v. Wood*, 50 Ind. 405, and *English v. Beard*, 51 Ind. 489, and to be condemned by other courts as well as by text-writers. It remains to add that the cases of *Ryan v. New York, etc., R. R. Co.*, 35 N. Y. 210, and *Fairbanks v. Kerr*, 70 Pa. St. 86 (10 Am. R. 664), on which the cases of *Krach v. Heilman, supra*, and *Collier v. Early, supra*, are mainly founded, are in direct conflict with the decision in *Louisville, etc., R. W. Co. v. Krimming*, 87 Ind. 351. Not only is this true, but it is also true, as shown by Judge Cooley, that the cases of *Ryan v. New York, etc., R. R. Co., supra*, and *Fairbanks v. Kerr, supra*, are everywhere repudiated. Cooley Torts, 76 n. The courts of New York have not followed *Ryan v. New York, etc., R. R. Co., supra*, as very clearly appears from the decisions in *Webb v. Rome, etc., R. R. Co.*, 49 N. Y. 420 (10 Am. R. 389); *Pollett v. Long*, 56 N. Y. 200; *Wasmer v. Delaware, etc., R. R. Co.*, 80 N. Y. 212 (36 Am. R. 608). We need not stop to inquire whether the case of *Scheffer v. Railroad*, 105 U. S. 249, is sustained by authority or not, for it is readily discriminated from the present case; there the court held that the representatives of one who became insane from an injury received in a collision, and eight months afterward took his own life, could not recover. The court said: "The proximate cause of the death of Scheffer was his own act of self destruction. * * The argument is not sound which seeks to trace this immediate cause of the death through the previous stages of mental aberration, physical suffering, and eight months' disease and medical treatment to the original accident on the railroad." There is a plain difference between the case cited and the one at bar. In the former the immediate cause of death was an independent agency, and between the original

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injury and the death many other causes had intervened and a long time had elapsed ; while in this case the death occurred soon after the injury, and the effects of the injury were unbroken and continuous from the time it was received until death ensued.¹ In the case cited the violent act of the man himself produced the death ; while in the one in hand a disease superinduced by the injury caused the death, and there was no break in the line of causation.

A carrier of passengers is held to the exercise of a very high degree of care, and for a failure to use this care is responsible to a passenger who suffers an injury in a case where no fault of his contributes. It was said by this court in *Jeffersonville, etc., R. R. Co. v. Hendricks*, 26 Ind. 228, in speaking of the duty of railroad companies: " But they are required to exercise the highest degree of care to secure the safety of passengers, and are responsible for the slightest neglect, if an injury is caused thereby." There are many cases in our own reports to the same effect. *Gillenwater v. Madison, etc., R. R. Co.*, 5 Ind. 339 ; *Thayer v. St. Louis, etc., R. R. Co.*, 22 Ind. 26 ; *Sherlock v. Alling*, 44 Ind. 184 ; *Louisville, etc., R. R. Co. v. Kelly*, *supra*. The rule is stated in stronger terms by the courts elsewhere as well as by the text-writers. *Hutchinson Carriers*, sections 500, 501, n ; *Thompson Carriers*, 200, 204.

It is the duty of railroad carriers of passengers to stop at the regular stations and at safe places for alighting. Thompson says: " It is the duty of servants of the railway company to run their trains so that a passenger shall have a reasonably safe and convenient place for alighting." *Thompson Carriers*, 228. This is substantially declared in *Jeffersonville, etc., R. R. Co. v. Parmalee*, 51 Ind. 42. In *Memphis, etc., R. R. Co. v. Whitfield*, 44 Miss. 466 (7 Am. R. 699), the court said in a case very like the present: " Stopping the train at an unusual place, rendered the company presumptively in the wrong to that extent, and the *onus* of explaining this neglect was thrown upon the defendants." *Shearman & Redf. Neg.*, sections 12, 280 ; *Curtiss v. Rochester, etc., R. R. Co.*, 29 Barb.

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282; Angell Carriers, section 569; 2 Redf. R. W., section 176. It is said by Hutchinson: "The passenger is entitled not only to be properly carried, but he must be carried to the end of the journey for which he has contracted to be carried, and must be put down at the usual place of stopping." Hutchinson Carriers, section 612. In *Praeger v. Bristol, etc., R. W. Co.*, 24 L. T. (N. S.) 105, the train ran by the platform and the passenger was injured in leaving the car. The carrier insisted that there was no evidence of negligence, but COCKBURN, C. J., said: "The question is whether there was a want of reasonable care on the part of the company, and I think there was not only evidence, but abundant evidence, of this." The case of *Cockle v. South-Eastern R. W. Co.*, 27 L. T. (N. S.) 320, is very similar to the one just cited, and a like ruling was made. In the case last named it was said: "But it appears to us that the bringing up of a train to a final standstill, for the purpose of the passengers alighting, amounts to an invitation to alight, at all events, after such a time has elapsed that the passenger may reasonably infer that it is intended he should get out if he proposes to alight at the particular station." It is held in the case cited, and in many others, that where the stop is made at a dangerous place near the usual station, and about the usual time for stopping, the carrier should warn the passengers not to leave the train, or should apprise them of the dangerous place. *McLean v. Burbank*, 11 Minn. 277, *vide* opinion, p. 288; *Maury v. Talmadge*, 2 McLean, 157; *Laing v. Colder*, 8 Pa. St. 479; *Stokes v. Saltonstall*, 13 Peters, 192; *Montgomery, etc., R. R. Co. v. Boring*, 51 Ga. 582. The case of *Pennsylvania R. R. Co. v. White*, 88 Pa. St. 327, is very like the present, and the plaintiff was held entitled to recover. The court said: "It is the duty of the company to provide for the safe receiving and discharging of passengers. It is bound to exercise the strictest vigilance not only in carrying them to their destination, but also in setting them down safely, if human care and foresight can do so: *Railroad Co. v. Aspell*, 11

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Harris, 147." Applying the law as declared by the authorities cited, and many more might be added, it is clear that there was a breach of duty in running by the station and stopping at a dangerous place.

A rule adopted by this court and sanctioned by many authorities of the highest character here requires attention. That rule is thus stated by Judge Redfield: "The fact that injury was suffered by any one while upon the company's trains as a passenger, is regarded as *prima facie* evidence of their liability." Redf. Car., section 341. Professor Greenleaf's statement of the rule is substantially the same. 2 Greenl. Ev., section 227. Judge Cooley gives the question careful consideration, and makes a like statement of the rule. Cooley Torts, pp. 660, 663.

In the early English case of *Christie v. Griggs*, 2 Campb. 79, it was said: "The plaintiff had made a *prima facie* case by proving his going on the coach, the accident, and the damage he has suffered." This rule has long been recognized by our cases as the correct one. In speaking of the effect of evidence of the fact that an injury was received by the passenger, it was said, in *Jeffersonville, etc., R. R. Co. v. Hendricks*, *supra*: "Ordinarily such fact should be regarded, at least, as *prima facie* evidence of negligence on the part of the company," and this statement of the rule is adopted in the subsequent cases of *Sherlock v. Alling*, *supra*; *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462; *Cleveland, etc., R. W. Co. v. Newell*, 75 Ind. 542; *Memphis, etc., Co. v. McCool*, 83 Ind. 392, S. C., 43 Am. R. 71. In the case last named many authorities are cited, to which may be added *Railroad Co. v. Walrath*, 38 Ohio St. 461, S. C., 43 Am. R. 433; *Philadelphia, etc., R. R. Co. v. Anderson*, 94 Pa. St. 351, S. C., 39 Am. R. 787; *Indianapolis, etc., R. R. Co. v. Horst*, 93 U. S. 291; *Roberts v. Johnson*, 58 N. Y. 613; *Pittsburgh, etc., R. R. Co. v. Pillow*, 76 Pa. St. 510, S. C., 18 Am. R. 424.

The rule is a general one, and is stated in general terms, and it is not to be understood that it goes to the extent of

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supporting a claim to a recovery where the evidence shows there was no negligence on the part of the carrier, or rebuts the presumption of negligence. It must, therefore, be true in most instances that the negligence, or freedom from negligence, will appear from the evidence, because, in proving the occurrence from which the injury resulted, the nature and cause of the accident will necessarily appear. Of course, if the evidence rebuts the presumption of negligence, there can not be said to be a *prima facie* case, although there may be an accident and an injury.

In some of the cases the view is taken that if a thing occurs which ought not to have occurred, had the requisite degree of care been exercised, then the carrier must show that such care was exercised. In one case it was said: "But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care." *Scott v. London, etc., Co.*, 3 H. & C. (Exchequer) 596. Of the case cited, a judge, perplexed by the confusion consequent upon the departure from the ancient rule, said: "I now gladly turn to one case, distinguished from the chaos of authorities depending on particular facts, by an attempt at the application of something in the nature of principle to cases of this class." *Flannery v. Waterford, etc., R. W. Co.*, 11 Irish C. L. 30. In the case at bar there was no evidence explaining the failure to stop at the regular station, nor was there any explanation of the failure to give warning; neither was there any explanation of the cause of stopping on the dangerous trestle bridge.

We think the evidence fully sustains the finding that there was negligence on the part of the appellant.

The remaining question is whether the intestate was guilty of such contributory negligence as bars a recovery. The question of contributory negligence is generally one for the

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jury, and courts interfere with the verdict only in clear cases. *City of Indianapolis v. Gaston*, 58 Ind. 224; *Pennsylvania Co. v. Hensil*, 70 Ind. 569 (36 Am. R. 188); *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43 (32 Am. R. 94); *City of Washington v. Small*, 86 Ind. 462, see page 469; *Pennsylvania R. Co. v. White*, 88 Pa. St. 327; *Willard v. Pinard*, 44 Vt. 34.

The court can not declare as matter of law that a passenger is guilty of contributory negligence, who alights from a train, on a dark night, after the customary signal has been given for stopping at his known destination, and the train has fully stopped near the usual alighting place and near the time when it was there due. We have already quoted from cases holding that a passenger who alights when a train is brought to a full stop, near the usual alighting place, is not guilty of contributory negligence in attempting to leave the train, unless it appears that the danger was apparent, and we now direct attention to other cases bearing upon the same subject. In *Robson v. North Eastern R. W. Co.*, L. R., 10 Q. B. 271, the train overshot the platform but the station was not called, and the passenger attempted to alight and was injured. It was held that a nonsuit was improperly directed. It was said "that there was evidence from which a jury might have properly found that the plaintiff was invited or had reasonable ground for supposing she was invited to alight by the company's servants." The language of the court in *Curtis v. Detroit, etc., R. R. Co.*, 27 Wis. 158, clearly states a general principle applicable to this case: "If, under the circumstances of this case, the train, in being brought up to the station, came to a stop in such a manner as to induce the belief on the part of the passengers in waiting on the platform that it had stopped for the reception of passengers, and then, when the passengers, acting on this belief, were going aboard, started again without caution or signal given, that would constitute an act of negligence on the part of the company, and be so without regard to the question whether the starting was one of necessity, or whether the stop was an actual or only

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an apparent one. It was the duty of the company, if the passengers were not to enter the cars under such circumstances, to have some one there to warn and prevent them." In our own case of *Evansville, etc., R. R. Co. v. Duncan*, 28 Ind. 441, a complaint, after alleging that the plaintiff took passage for Fort Branch and like matters, stated that by the carelessness of the defendant the train stopped at the town of Fort Branch before that part of the train on which the plaintiff was seated had reached the depot, and that by reason thereof the plaintiff was compelled to jump from the car to the ground, and the complaint was held sufficient, the court saying: "As to the second objection, it is sufficient to say that we do not understand from the averments that the rash conduct of the plaintiff produced the injury." In *Columbus, etc., R. W. Co. v. Farrell*, 31 Ind. 408, the general doctrine we have laid down is recognized and enforced.

In *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48, the court said: "Was not the attempt of the decedent to leave the cars, under the facts stated, 'made under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom?' If it was, then the decedent was without fault or negligence; and in our opinion, the decedent was not guilty of negligence in attempting to leave the train under the circumstances." The question stated in this quotation is that which arises in all cases of a kindred character, and is one, as a general rule, to be left to the jury. The principle that a man is not guilty of contributory negligence who acts upon a reasonable belief arising from surrounding circumstances, is one of wide application, finding perhaps one of its most striking applications in that class of cases where a passenger leaves a train in order, as he believes, to escape impending danger. *Stokes v. Saltonstall, supra*; *Twomley v. Central Park, etc., R. R. Co.*, 69 N. Y. 158, S. C., 25 Am. R. 162, 164 n.; *Wilson v. North Pacific R. R. Co.*, 26 Minn. 278, S. C., 37 Am. R. 410; *Iron R. R. Co. v. Mowery*, 36 Ohio St. 418, S. C., 38 Am. R. 597. In all such cases the passenger

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is excused, even though his belief was an erroneous one, and but for his leaping from the train no injury would have resulted. Without going further into this subject, although many more authorities might be cited, we conclude by a quotation from a recent English author who, after a thorough review of the adjudged cases, says: "But the question of what circumstances amount to an invitation to alight is clearly one for a jury; and although there seems to have been difficulty felt in time past by some of our judges in reference to this point of law, it seems impossible that any further doubt should exist." Wood's Browne Carriers, 507.

The principles we have stated rule the case and dispose of all the questions presented, whatever form they may assume. Judgment affirmed.

Filed March 5, 1884.

ON PETITION FOR A REHEARING.

ELLIOTT, J.—We have given the elaborate brief filed on the petition for a rehearing careful study, but find nothing in it that shakes our confidence in the conclusions stated in our former opinion.

Counsel assume that the fever of which the plaintiff's intestate died was an independent cause, entirely separate from the injury received by the fall from the trestle-work. The evidence does not warrant this assumption, for it shows that the injury concurred in producing the fever, and also in producing the enfeebled condition which incapacitated the injured man from resisting the inroads of disease. There was not only a condition created which made it probable that the intestate would take on the disease, but there was also such an enfeeblement of the system as impaired its power to repel disease.

Counsel argue the case as though it were necessary that the evidence should show with direct and positive certainty that the injury produced death. The assumption upon which the argument rests can not be made good. It is not necessary in any civil case to prove the substance of the issue by direct or

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positive evidence. It is sufficient if there are facts fairly warranting the jury in inferring the conclusion insisted upon by the plaintiff. *Indianapolis, etc., R. R. Co. v. Collingwood*, 71 Ind. 476; *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194; 1 Greenl. Ev., section 13, n. In the case before us, the evidence very clearly and fully warranted the inference that the injury concurred in producing death; indeed, any other conclusion would be directly opposed to that which the evidence supports.

It was not necessary that the appellee should show that the injury was the sole or direct cause of the death. The conclusion stated in our former opinion is fully sustained by a case which has been brought to our attention since that opinion was written. The case to which we refer is that of *Beauchamp v. Saginaw, etc., Co.*, 50 Mich. 163, S. C., 45 Am. R. 30. In the course of the opinion the court said: "Is it clear beyond dispute, that the cold taken, pneumonia and death were independent and separate from the injury received and sickness resulting therefrom? Can it be said with judicial certainty that the injury, the sickness and weakness following therefrom did not directly cause or largely contribute to the attack of pneumonia, and that the party wrongfully injured was as able to withstand this resultant attack as he would have been if 'a good, healthy, well nourished boy' as at the time he received the injury? If the injury received and sickness following concurred in and contributed to the attack of pneumonia, the defendant must be held responsible therefor. It can not be said that here was a second wrongful act, or a disease, wholly independent of the first wrong, which caused the death of the boy. *People v. Cook*, 39 Mich. 239." The case in hand is in every feature infinitely stronger than the one from which we have quoted.

In commenting upon the case of *Baltimore, etc., R. R. Co. v. Reaney*, 42 Md. 117, cited in the former opinion, counsel criticise it with much severity, but their judgment is opposed by very weighty authority. The case is fully approved in

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Beauchamp v. Saginaw, etc., Co., supra, and in the following text-books is cited with approval: Cooley Torts, 79; 2 Thompson Neg. 1084; 3 Sutherland Dam. 418. It is sustained by the English cases which are cited in the opinion of the court, and we are content to join them rather than follow counsel.

Cases are cited by counsel as to evidence of negligence in cases where the relation of carrier and passenger does not exist, and all that need be said of them is that they have no application at all to a case like this, where the relation of carrier and passenger existed.

The general rule upon the subject of proof of negligence in a case like this, stated in our former opinion, is that laid down in *Jeffersonville, etc., R. R. Co. v. Hendricks, supra*, where it was held that proof of the happening of an accident to a passenger is *prima facie* evidence of negligence on the part of the carrier, and that rule has been enforced by many cases, as we have heretofore shown. We did not hold in our former opinion that the rule applied to a case where there was nothing more than a simple failure to stop at a regular station; we had no such case before us; but we did hold that the general rule applied to a case where the evidence showed that the train was stopped on a dangerous trestle-work after there had been an implied invitation to alight, and where no warning was given to the passenger to remain on the train. We have no doubt that such evidence makes a *prima facie* case which will prevail unless overcome by evidence from the carrier. The case of *Delaware, etc., R. R. Co. v. Naphes*, 90 Pa. St. 135, sustains our view and lends counsel no support. In that case it was said that the general rule was a reasonable one, "because the company has in its possession and under its control, almost exclusively, the means of knowing what occasioned the injury and of explaining how it occurred, while as a general rule, the passenger is destitute of all knowledge that would enable him to present the facts, and fasten negligence on the company, in case it really existed." Any other rule would practically absolve railway carriers from lia-

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bility in a great majority of cases, for the passenger would seldom be able to ascertain the real cause of the accident. The case before us supplies an apt illustration of the unreasonableness of the rule for which the railroad company contends. How could Mr. Buck, made delirious by his fall from the trestle-work, have ascertained what caused the train to run by the station and stop a short distance beyond upon a dangerous trestle-work?

There was no evidence satisfactorily explaining the stopping of the train upon this trestle-work, and the failure to warn of danger the passenger that the conductor knew expected to alight at the station. Nor was there evidence explaining why the train ran by. There was evidence showing that the brakes slipped, but no evidence at all showing that they were in order, were properly constructed, or even that they were properly applied. They may have been air brakes, and yet neither properly constructed, nor in good order, nor timely applied. The conductor, knowing that his passenger desired to alight, and knowing, as the evidence tended strongly to show, that the name of the little station was not usually cried, ought to have seen that the passenger was in some way notified of the dangerous stopping place. There were other facts tending to show negligence, as, for instance, that the men engaged in running the train were taken from other trains, and, taking all the evidence together, it was abundantly sufficient to warrant the jury in inferring negligence.

We do not deem it necessary to again go over the authorities cited on the subject of contributory negligence; they fully sustain our conclusion. The question in *Cincinnati, etc., R. Co. v. Peters*, 80 Ind. 168, was one of pleading; here it is one of evidence. All that was decided in that case is stated in the opinion of WORDEN, J. The argument of Commissioner FRANKLIN was not approved. The case of *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48, fully sustains the conclusion reached by us. We quote: "Was not the attempt of the decedent to leave the cars, under the facts stated, 'made

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under such circumstances that a person of ordinary caution and care would not have apprehended danger therefrom?' If it was, then the decedent was without fault or negligence; and in our opinion, the decedent was not guilty of negligence in attempting to leave the train under the circumstances. The train having very nearly come to a full stop, the decedent had the right to suppose that it would stop long enough for her to leave the train; and she had also the right to suppose that some of the agents of the company would be present to aid and assist her in leaving the cars, and if her just expectations had been realized, she could and would have safely left the train." So, in this case, if the railroad company had done its duty, or had conformed to its usual practice, the deceased's reasonable expectations would have been realized, and he could have left the train in safety. The text-writer referred to by counsel gives their argument no support, for he says, as we have said, that the question of contributory negligence is "in every instance of the kind one of fact for the jury." Hutchinson Carriers, section 615. It is also said by this author: "Such companies must be extremely careful not to mislead their passengers into the belief that the halting of a train at a station is meant as an invitation to them to alight where it is not so intended, and that if the conduct of the servants engaged in its management is such as may reasonably produce that impression, and the passenger so understands it, and in the attempt to leave the coach at a place where there are no facilities provided for his doing so, and whilst in the exercise of due diligence he is injured, the company will be liable."

In the case in hand we need not inquire what effect contradicted evidence that it has been the uniform custom to call the station before permitting passengers to alight would have had, for there was evidence tending to show that there was no such custom, and that the station was very seldom called.

Petition overruled.

Filed June 25, 1884.

Cunningham v. Baxley et al.

No. 11,300.

CUNNINGHAM v. BAXLEY ET AL.

LEASE.—*Descents.*—*Decedents' Estates.*—*Life-Estate.*—*Chattel.*—A lease of lands for the life of the lessor is a chattel, and on the death of the lessee it goes, not to his heirs, but to his administrator, and the former can not maintain a suit for possession.

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From the Harrison Circuit Court.

M. W. Funk and *W. D. Mauck*, for appellant.

W. N. Tracewell and *R. J. Tracewell*, for appellees.

BICKNELL, C. C.—The appellees, who are the widow and heirs at law of William Applegate, brought this suit against the appellant to recover the possession of land and damages for its unlawful detention.

The complaint alleged that Sarah Applegate had a life-estate in the land, and made a parol contract with said William Applegate that if he would build a house and barn and plant an orchard on the land, and give to said Sarah one-third of the corn and wheat raised on said land and a load of hay yearly from the meadow on said land, in consideration thereof he might occupy, use and have the possession of said land during said Sarah's lifetime; that said William built said house at an expense of \$1,000, and a barn at an expense of \$400, and planted an orchard of the yearly value of \$100, and continued in possession of the premises, rendering to said Sarah yearly one-third of the wheat and corn raised thereon, and one load of hay, until he died, leaving the plaintiffs as his only heirs at law, who since his death have in all things performed said contract; that by reason of the facts aforesaid, said plaintiffs are the joint owners of said land for and during the life of said Sarah, and are entitled to the immediate possession thereof; that said Sarah is still living; that said defendant is without right in the unlawful possession of said land, and has unlawfully detained the same from the plaintiffs since June 20th, 1882. The complaint demands possession of the land and \$50 damages.

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A demurrer to the complaint for want of facts sufficient was overruled. The defendant answered by a general denial.

The issue was tried by the court, who found for the plaintiffs that they are the joint owners of the land during the lifetime of the said Sarah Applegate, who is still living, and are entitled to the possession thereof, and that the defendant unlawfully detains the possession from the plaintiffs to their damage \$10.

The defendant moved for a new trial because the decision of the court was contrary to law and the evidence, and was not sustained by sufficient evidence. This motion was overruled. Judgment was rendered on the finding, and the defendant appealed. He assigns errors as follows:

1. The court erred in overruling the demurrer to the complaint.

2. The court erred in overruling the motion for a new trial.

No question is presented by the motion for a new trial, because there is no bill of exceptions showing what the evidence was. *Louisville, etc., R. W. Co. v. Henly*, 88 Ind. 535.

A life-estate for one's own life is an interest in land; at common law it was a freehold; an alienation of it in any form for the life of the tenant himself was always valid, and a mere grant or release by him passed, at common law, only what he might lawfully grant. Co. Litt. 251, b. Therefore, if Sarah Applegate had by deed conveyed to William Applegate all her right, title and interest, he would have become the owner of the land during her life, and his interest, in that case, being a valid subsisting interest in real property, would, under our statutes, have descended to his heirs upon his death during the lifetime of Sarah, and they could have maintained ejectment thereon. R. S. 1881, sections 1050, 2467. But here William Applegate had not a deed; he had not even a contract for a deed. The complaint does not aver a purchase of Sarah Applegate's interest; it shows that William Applegate was only a sub-tenant under a parol lease; it shows that Sarah Applegate, owning the life-estate, agreed that William

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Applegate "might occupy" the land until her death, in consideration of his building a house and barn and planting an orchard and paying her a fixed yearly rent; it shows that he took possession, and during his life performed the conditions and paid the rent, and died during the lifetime of Sarah Applegate. He had a lease of the land which was not to terminate until her death, provided the rent should be duly paid. Such a lease is not real estate; it is a chattel interest; it does not descend to heirs, but goes to the executor or administrator, and he is the party to maintain a suit for possession against one who has wrongfully taken possession of the leased premises. *Smith v. Dodds*, 35 Ind. 452. There was no cause of action in favor of plaintiffs.

The court therefore erred in overruling the demurrer to the complaint, and for this error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded with instructions to sustain the demurrer to the complaint.

Filed June 25, 1884.

No. 11,670.

SHIRCLIFF v. THE STATE.

CRIMINAL LAW.—*Conspiracy.*—*Bribery.*—*School Trustee.*—*Employment of Teacher.*—*Indictment.*—An indictment, charging a conspiracy to bribe a township trustee by the payment or promise of money, to employ a person as a teacher of a public school in the township, is good, under section 2139, R. S. 1881, without averring that any of the schools was vacant.

SAME.—*Bill of Exceptions.*—*Continuance.*—*Affidavits.*—*Record.*—In criminal cases, affidavits in support of a motion for a continuance or other motions are made part of the record only by bill of exceptions, and if this be filed in vacation, no time having been given therefor, it is no part of the record.

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 Shireliff v. The State.

SAME.—*Discharge of Defendant to Testify.*—*Witness.*—*Practice.*—Where one of two persons indicted is discharged under section 1804, R. S. 1881, in order to make him a witness, objection thereto can not be first made in the Supreme Court.

SAME.—*Special Judge.*—*Appointment of.*—*Presumption.*—*Judgment.*—After a verdict of guilty upon an indictment, and motions for a new trial and in arrest of judgment and for discharge had been overruled, the defendant made default before judgment. At the next term the special judge who tried the cause was absent, and the regular judge, being unable to hold the court, appointed another special judge, whose appointment and oath were entered of record, and on the same day another special judge was appointed, and his appointment and oath likewise recorded, and this last judge acted in the cause, and rendered judgment. It did not appear whether the special judge first appointed acted at any time during the term.

Held, that it would be presumed that the judge who acted was appointed because the first appointee absented himself, and, therefore, properly appointed.

From the Martin Circuit Court.

C. H. McCarty, E. Moser, — Shirey and — Brooks, for appellant.

F. T. Hord, Attorney General, *J. E. Henley,* Prosecuting Attorney, and *W. B. Hord,* for the State.

ZOLLARS, J.—An indictment was returned against appellant and one Edward O'Connor. The material part of the indictment is as follows: "That Alexander Shireliff and Edward O'Connor * * * did then and there unlawfully and feloniously unite, combine and conspire, each with the other, for the purpose of feloniously, unlawfully and corruptly bribing and offering to bribe, and by the payment of money by said Alexander Shireliff and Edward O'Connor, and by the promise of the payment of money by the said parties, to corruptly and feloniously influence one Valentine Strange, who was then and there the township trustee of Brown township, of Martin county, and *ex officio* school trustee within and for said Brown township, of Martin county, to employ the said Edward O'Connor as teacher of one of the public schools of said township, to wit, in one of the district schools for the

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period of 100 days, at the price of \$2.50 per day, and, as a further combination and conspiracy with each other, to unlawfully, feloniously and corruptly bribe and influence said Valentine Strange, as such trustee as aforesaid, to so employ said Edward O'Connor as such teacher, he, the said Edward O'Connor, and Alexander Shircliff agreeing to allow said Valentine Strange to retain for his own individual and personal use, out of the said wages of said Edward O'Connor, as such teacher, the sum of \$50, contrary," etc. This indictment is not as concise and perspicuous as it might be, but properly understood and interpreted, it is not double.

Properly interpreted, it charges that the defendants conspired and confederated together for the purpose of unlawfully influencing the trustee by the corrupt and unlawful use of money. The prosecution is based upon sections 2139 and 2009, R. S. 1881.

It is provided in section 2139 that any person or persons who shall unite or combine with any other person or persons for the purpose of committing a felony shall, upon conviction thereof, be fined in any sum, etc., and imprisoned, etc.

It is provided in section 2009 that whoever corruptly gives, promises, or offers to any State officer, or other officer, agent or employee of the State, or person holding any office of trust or profit under the laws of this State, any money or valuable thing, or corruptly offers or promises to do any act beneficial to such person to influence his action, vote, opinion or judgment in any matter pending, or that might legally come before him, shall, upon conviction, be fined and imprisoned in the State prison, etc.

It is not charged that any of the schools were without teachers, but we know, as a matter of law, that it is the duty of school trustees to employ teachers, and that such employment is a "matter that might legally come before him." It is not necessary that the means agreed upon to influence the officer shall be such as may be enforced as a legal contract; nor is it necessary that the object of the conspiracy should

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be consummated. *Miller v. State*, 79 Ind. 198. The purpose of the statute is to protect the public service, and hence it is made a crime to conspire and confederate to corrupt and debauch it. The indictment makes a case under the statute, and the motion to quash was therefore correctly overruled.

Appellant insists that the judgment should be reversed, because the court below erred in overruling his motion for a continuance, and in the admission of improper evidence.

We can not disregard the contention of counsel for the State, that these questions are not presented by the record. The motion for a new trial was overruled, and judgment rendered upon the verdict, on the 9th day of April, 1884. No time was asked or given in which to file a bill of exceptions. A bill was filed with the clerk after the expiration of the term of court. Under the statute and repeated decisions of this court, the bill thus filed did not become a part of the record, and hence the matters therein stated can not be considered in the decision of the case. Section 1847, R. S. 1881; *Colee v. State*, 75 Ind. 511.

An affidavit for a continuance is not a part of the record on appeal to this court, unless brought into the record by a bill of exceptions. *Colee v. State*, *supra*; *Beard v. State*, 54 Ind. 413.

In this case the affidavit for a continuance was not copied into the bill of exceptions, and hence is not before us; and if it had been, it would not be before us for the reason that the bill of exceptions is not in the record. An objection and exception upon the admission of evidence can be presented only by a bill of exceptions. As the bill in which it was sought to present the question upon the admission of evidence in this case is not in the record, no such question is before us.

Appellant was arrested upon a bench warrant, and admitted to bail. After this, upon his motion, there was a change of venue from the judge. A special judge was appointed to try the case. The record states that, following this, O'Connor was discharged to be used as a witness for the State.

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The statute provides that when two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defence, direct any defendant to be discharged, that he may be a witness for the State. Section 1804, R. S. 1881; Moore Crim. Law, section 319; *Baker v. State*, 57 Ind. 255. There is nothing to show but that the discharge of O'Connor was by the direction of the court. Some question is made that the special judge had no authority to direct the discharge. So far as shown by the record, no objection was made in the court below, either to the authority of the judge to act in the premises, or to the discharge of O'Connor. The objection here for the first time comes too late, as the failure to object below was a waiver.

The verdict, fixing appellant's imprisonment in the State prison at two and one-half years, and imposing a fine of \$100, was returned on the 31st day of January, 1884. A motion for a new trial was filed on the 1st day of February, and overruled, as also a motion to discharge appellant, and a motion to arrest the judgment.

Appellant having absented himself from the court, his bond was forfeited, and an order made for his arrest. In this shape the case went over to the April term. At that term the special judge who tried the case does not seem to have been present. The regular judge, being unable to preside, appointed an attorney as a special judge, apparently for the term. His appointment and oath were filed and recorded.

On the same day the regular judge made an appointment of another attorney as a special judge. In this appointment the fact of the change of venue from the regular judge, the appointment of the special judge who tried the case at the previous term, the fact that on account of appellant's absence from court the case was not disposed of at that term, and the fact that the said special judge had failed to appear at the April term, etc., were recited. This appointment, together with the oath of the appointee, was properly recorded.

Subsequent to this, the last appointed special judge ordered

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appellant into the custody of the sheriff, and rendered judgment upon the verdict. From this custody appellant moved to be discharged. The motion was based upon an affidavit; the affidavit is copied into the transcript by the clerk. This, however, does not make it a part of the record. To become a part of the record it should have been incorporated into a bill of exceptions. As it has not been so brought into the record, we can not look to it in passing upon the motion. The contention is that the special judge who ordered appellant into custody, and pronounced judgment upon the verdict, had no authority to do so, by reason of the previous appointment of a special judge for the term. As to whether that special judge presided at any time during the term, or was at any time present except when he filed his written appointment, is not shown by the record. For aught that appears from the record he was absent, or for some cause was unable to preside. In support of the regularity and validity of the proceedings, and in the absence of a contrary showing, it should be presumed that he either declined or was unable to preside. Such being the case, the regular judge had the undoubted right to appoint another special judge to finally dispose of appellant's case. *Fassinow v. State*, 89 Ind. 235.

As the record presents no question or error which would justify a reversal, the judgment is affirmed, with costs.

NIBLACK, J., did not participate in the decision of this case.

Filed June 25, 1884.

No. 11,635.

THE STATE, EX REL. ELLIOTT, v. BEMENDERFER.

COUNTY COMMISSIONERS.—*Vacancy.—Holding Over.—Office and Officer.*—

Where one is elected county commissioner, qualifies by taking the oath required by law, and dies before his term begins, his predecessor can not hold over.

From the Elkhart Circuit Court.

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The State, *ex rel.* Elliott, v. Bemenderfer.

*H. D. Wilson, W. J. Davis and A. Anderson, for appellant.
J. H. Baker and J. A. S. Mitchell, for appellee.*

ELLIOTT, C. J.—The relator claims the office of county commissioner, and for the purpose of securing the office filed the information against the appellee who asserts a right to the same office. The information charges that the relator was elected commissioner for the second district of Elkhart county, at the general election in October, 1880, and that he was duly inducted into office in November of that year; that William McVitty, an eligible candidate, was duly elected as the relator's successor at the general election held in November, 1882, and within ten days from the time of receiving the certificate of election, duly subscribed the proper oath of office, which was endorsed on the back of the certificate as the statute requires; that on the 2d day of March, 1883, McVitty died, and that, at the time of his death, his term of office had not commenced; that on the 3d day of December, 1883, the board of commissioners declared that a vacancy existed by reason of McVitty's death, and elected the appellee to fill the vacancy.

The contention of the relator's counsel is that as McVitty died before his term of office commenced, he was never qualified, and, therefore, no successor to the relator was ever elected and qualified. This position is not tenable. The right of McVitty to the office was vested at the time he took the oath in the manner and form required by law, and his subsequent death did not entitle the relator to hold over. A vacancy resulted for the reason that a successor to the relator had been duly elected and qualified, and this having taken place his right to hold over terminated. It can not be legally possible that when the right to an office has once been destroyed or terminated, the subsequent death of the person who had been elected and who had duly qualified, revives the right which the election and qualification had put an end to, for the right to hold over exists only in cases where

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there is no legally elected and qualified successor. When the rights of the successor vest, those of the incumbent terminate, and they do vest after election and qualification according to law. This is clear on principle, but authorities are not wanting.

The term "qualified" as used in the statute does not mean possessed of the necessary political, mental and moral endowments, but means the acts performed after election, as taking an official oath and executing an official bond. The term "eligible" expresses the meaning which the relator asks us to affix to the term "qualified." *Carson v. McPhetridge*, 15 Ind. 327; *Jeffries v. Rowe*, 63 Ind. 592. Eligible means capable of being chosen; while qualified means the performance of the acts which the person chosen is required to perform before he can enter into office. *Searcy v. Grow*, 15 Cal. 117. Abbott, in defining the word "qualify," says: "It means to take the oath and give the bond required by law from an administrator, executor, public officer or the like, before he may enter on the discharge of his duties." L. Dict. In *Steinback v. State, ex rel.*, 38 Ind. 483, it was said: "The term qualified was not used in its ordinary or popular signification, as possessed of endowments or accomplishments, or intellectual capacity, or moral worth to discharge the duties of an office, but the framers of the Constitution intended thereby that a person who had been elected to an office, and had taken the oath of office, and given bond, where a bond is required, was qualified and had the right to assume and discharge the duties of such office." In *State, ex rel., v. Seay*, 64 Mo. 89, S. C., 27 Am. R. 206, it appeared that Peter B. McCord was elected to the office of judge, and within the proper time took the requisite oath of office, and it was held that his death before entering upon the duties of the office created a vacancy to be filled by appointment. In the case of *State, ex rel., v. Hopkins*, 10 Ohio St. 509, the court went much further, and held that the death of the person elected before qualification created a vacancy. The decision in *Com. v. Hanley*, 9 Pa. St. 513, is that where

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the person elected to an office dies before giving bond as required by law the incumbent holds over; but it is also stated that if the person elected had qualified, it would be otherwise. It was held in *State, ex rel., v. Beard*, 34 La. An. 273, that the failure to qualify within the time prescribed by law created a vacancy to be filled by appointment. The case of *People v. Lord*, 9 Mich. 227, does not support the relator's contention. The comments made upon that case by the court in *State, ex rel., v. Seay, supra*, show the difference between the two cases.

We are satisfied that the right of the relator to hold the office ended at the time McVitty qualified, and that upon his death a vacancy occurred, which it was proper for the board of commissioners to fill by appointment.

Judgment affirmed, at the costs of the relator.

Filed June 24, 1884

 No. 10,205.

ELLIS ET AL. v. JOHNSON, TRUSTEE.

MORTGAGE.—Assumption of Payment of Mortgage Debt.—Conveyance.—Principal and Surety.—Vendor and Vendee.—A grantee of real estate, the deed of conveyance to whom contains a stipulation for his assumption of a debt secured by mortgage thereon, which debt his grantor is personally bound to pay, becomes, by the acceptance of such deed, personally bound to the mortgage creditor; as between such grantee and his grantor, the former becomes the principal debtor, while the latter becomes a surety.

SAME.—Foreclosure.—Pleading.—Exhibits.—Deeds.—Suit by Assignee of Mortgage Debt.—Effect as to One Grantee of Release of Another Grantee.—A. executed his mortgage on each of a number of town lots, to secure his notes given for the purchase-money thereof. He sold an undivided one-third interest in the lots to B., who was to pay one-third of the notes, and on sale of the lots, to share in that ratio in the profits and losses, the title to remain in A. for the benefit of A. and B. They sold, and A. conveyed, the lots to C., who sold and conveyed a portion of them to D. and the remainder to F. D. afterwards sold and conveyed his portion to F. By each of the deeds of conveyance, the grantee, as part of the purchase-money, assumed and agreed to pay the notes secured by the mortgages on the lots conveyed to him. The notes becoming due and remaining

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unpaid, A. and B. furnished money to G. to pay the notes and mortgage and procure assignments thereof to G. as trustee for A. and B. G. paid the money to the assignee and holder of the notes and mortgages, and procured him to assign the notes to G., who, having notified the persons who had assumed the notes and mortgages that he accepted their assumptions, and having demanded payment of them, brought his suit as such trustee against F. to foreclose the mortgages, and for personal judgment on the notes against F.

Held, that it was not necessary in such suit, for the purpose of enforcing against F. his assumption of the debt, to exhibit, as parts of the complaint, the deeds of conveyance to said grantees prior to F., and not necessary for the foreclosure of the mortgage to exhibit any of said deeds of conveyances.

Held, also, that whatever may have been the effect as against F. of the agreement between A. and B., the actual assignment to G. gave him a right of action as trustee of A. and B.

Held, also, that the fact that after the conveyance by D. to F., and before notice to F. of such acceptance by G., C., for a valid consideration, released D. from his liability on his said assumption, would not operate to release F., the principal debtor, from his liability to G.

From the Johnson Circuit Court.

A. B. Young, for appellants.

BLACK, C.—The appellee brought suit in the Superior Court of Marion county, his complaint consisting of fourteen paragraphs, to foreclose fourteen mortgages, each on one of fourteen lots in an addition to the city of Indianapolis, and to obtain a personal judgment against George W. Ellis upon notes secured by said mortgages, being four notes to each mortgage, payable in three, four, five and six years from their date. Said notes and mortgages were executed for the purchase-money of said lots by one Vajen and his wife to one Post in 1872.

It was alleged that Vajen afterwards sold an undivided one-third interest in said real estate to one Baldwin, upon the condition that the latter should pay one-third part of the purchase-price, as evidenced by said notes, and that upon the sale of said real estate he should share in the profits or losses arising out of such ownership and sale, according to his said

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interest of one-third, it being agreed that the title to said real estate should remain in said Vajen for the common benefit of himself and Baldwin, according to their interests. It was alleged that in 1873 Vajen and Baldwin sold, and Vajen conveyed, said real estate to Parker and Hanway, who, as a part of the purchase-money therefor assumed and agreed to pay said notes, such assumption and agreement being stipulated in the deed of conveyance to Parker and Hanway; that afterwards Parker and Hanway sold and conveyed ten of said lots, those described in the first ten paragraphs of the complaint, to said George W. Ellis, who likewise, as a part of the purchase-money, assumed and agreed to pay the notes secured by said mortgages on said ten lots, said assumption and agreement being stipulated in the deed of conveyance to said Ellis; that Parker and Hanway sold and conveyed the other four of said fourteen lots to one Bladen, who likewise, as a part of the purchase-money, assumed and agreed to pay said notes secured by said mortgages on said four lots, his said assumption and agreement being stipulated in the deed of conveyance to him; that Bladen afterwards sold and conveyed said four lots to said Ellis, who likewise, as a part of the purchase-money, assumed and agreed to pay said notes secured by mortgages on said four lots, said assumption and agreement being evidenced in like manner. Said notes being due and unpaid, Vajen and Baldwin furnished money to the plaintiff for the purpose of paying said notes and mortgages and procuring the assignment thereof by the holder to the plaintiff, as trustee of Vajen and Baldwin. Thereupon the plaintiff paid said money to the assignee and holder of said notes and mortgages, and procured him to assign said notes to the plaintiff, who alleged that he held them in trust for said Vajen and Baldwin, according to their said respective interests. And he alleged that before the commencement of this action he notified all and each of said persons who so assumed and agreed to pay said notes and mortgages, that he accepted the benefit of their assumptions and agree-

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ments to pay, and demanded that they comply therewith and pay said notes.

Parker, Hanway, Bladen, Ellis and his wife were made defendants. The Citizens National Bank of Indianapolis also was made a defendant, it being alleged that said bank had or claimed some interest in said real estate, which, if it existed, was junior and subject to the rights of the plaintiff.

George W. Ellis demurred to each paragraph of the complaint for want of sufficient facts, and the demurrer was overruled. He answered in a number of paragraphs, the first being a general denial. The only other paragraphs of his answer that need be specially mentioned were the fifth and sixth. By the fifth paragraph, which was directed to the first ten paragraphs of the complaint, it was in effect alleged that in 1876, and long before said Ellis had any notice or information that Pope, Vajen, Baldwin, or the plaintiff had elected or intended or proposed to avail themselves severally or otherwise of the stipulation of assumption in the deed of conveyance executed by Parker and Hanway to said Ellis, he, in pursuance of an agreement between him and Parker and Hanway, reconveyed the lots described in said ten paragraphs to Parker and Hanway, by a deed by the terms of which the grantees assumed and agreed to pay said debts so secured by mortgages on said ten lots, and agreed to fully release and discharge said Ellis from his obligation to said Parker and Hanway on account of said assumption stipulated in the deed of conveyance of Parker and Hanway to Ellis.

The sixth paragraph of the answer of Ellis, directed to the last four paragraphs of the complaint, so far as they sought a personal judgment against Ellis, alleged that in 1877, and before notice to said Bladen or said Ellis of the intention of any person to claim or assert any right under the stipulation for the assumption by said Bladen of the mortgage debts mentioned in said four paragraphs, Bladen conveyed certain property and made certain payments of money to Parker and Hanway, who, in consideration thereof, agreed to release, and

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did release, Bladen and Ellis from all liability in favor of Parker and Hanway on account of said stipulation and agreement of assumption of said Bladen.

The plaintiff replied by a general denial. The venue was changed to the Johnson Circuit Court. The suit having been dismissed as to the defendant Bladen, the other defendants, except Ellis, were defaulted. The cause was tried by the court, and a special finding was rendered. Ellis excepted to the conclusions of law, and moved unsuccessfully for a new trial, and judgment was rendered against Ellis for the sum of \$2,999.42, and the foreclosure of said mortgages was decreed.

All the judgment defendants are appellants except the wife of Ellis, who, having been notified, has declined to join; but Ellis alone assigns error.

It is well settled in this State that a grantee of real estate, the deed of conveyance to whom contains a stipulation for his assumption of a debt secured by mortgage thereon, which debt his grantor is personally bound to pay, becomes, by the acceptance of such deed, personally bound to the mortgage creditor; that as between such grantee and his grantor, the former becomes the principal debtor, while the latter becomes a surety. *McDill v. Gunn*, 43 Ind. 315; *Josselyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113; *Smith v. Ostermeyer*, 68 Ind. 432; *Figart v. Halderman*, 75 Ind. 564; *Hill v. Minor*, 79 Ind. 48.

While the deeds of conveyance from Parker and Hanway to Ellis and Bladen, and that of Bladen to Ellis, were made exhibits of the complaint, that of Vajen to Parker and Hanway was not set out; and it is urged, in objection to the complaint, that it was necessary, as against Ellis, to set out a copy of the last mentioned deed. The objection can not be sustained. The deed of Vajen did not constitute the foundation of the action against Ellis upon his assumption of the mortgage debt, and as to the claim against Ellis for a personal judgment, it was sufficient to state the legal effect of

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the deeds prior to those containing the stipulations for the assumption of the debt by Ellis. Besides, the complaint was sufficient for the purpose of the foreclosure of the mortgages as against Ellis without exhibiting any of the deeds of conveyance.

It is further urged against the complaint, that the alleged agreement between Vajen and Baldwin was void under the statute of frauds, and that, therefore, Baldwin did not acquire any rights as against Ellis. It is not material whether Baldwin received any ownership of the real estate or became liable to Pope, the original creditor. It was shown that there was an actual assignment to the appellee as trustee of Vajen and Baldwin, neither of whom was bound to Ellis to pay the debt; and it is not necessary to determine what would have been the result of payment by Vajen and Baldwin without such assignment of the debt, for which Ellis was bound as a principal debtor. There was no error in the ruling upon the demurrer to the complaint.

We need not take space to set out the special finding; it will suffice to notice the objections urged against it not disposed of by what has already been said.

It is insisted that in order to support a conclusion that Ellis was personally liable to the plaintiff, it should have been stated in the finding of facts that Ellis was personally liable for the mortgage debt when it was assigned to the plaintiff. This would have been a statement of a conclusion of law where it was proper to state facts only.

The court found that after the sale by Bladen to Ellis, and the assumption by the latter of the debts secured by the mortgages on the four lots conveyed to him by the former, and prior to the date at which Ellis was notified by the appellee that he accepted the assumption by Ellis of said mortgage debts, Parker and Hanway, upon a valid consideration, agreed to release, and did release, Bladen from any further liability on account of his assumption of the notes of Vajen to Pope.

In discussing the special finding and the motion for a new

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trial, in which it was assigned as cause that the damages were excessive, it has been insisted that the release of Bladen operated as a release of Ellis as to said notes secured by said four mortgages. At the time of Bladen's release he had become, as between him and Ellis, a surety, and Ellis had become the principal. Whatever effect such release might have upon the liability of Bladen to the appellee, it could not affect the liability of Ellis to the appellee; Ellis had no interest in the preservation of the liability of Bladen to Parker and Hanway, or to the creditor. See *Tripp v. Vincent*, 3 Barb. Ch. 613; *Bentley v. Vanderheyden*, 35 N. Y. 677; *Jones Mort.*, sections 741, 983.

On the trial Ellis offered in evidence a certain transcript of the record of an action brought by Parker and Hanway against Ellis. Upon objection made by the appellee, this offered evidence was excluded. It appears by the proffered record that in the action of which it was a record an amended complaint was filed, but it is not set forth. At the place where it should appear are the words "here insert," in parenthesis. After the filing of this amended complaint, the attorneys for the plaintiffs withdrew their appearance, and the cause was submitted for trial "as to the defendant's cross bill." The finding and the judgment refer to the complaint, and without it they are unintelligible. For this reason there was no error in excluding the record, and we need not inquire whether there would have been any sufficient reason for rejecting a perfect record of the action.

The court also, upon objection of the appellee, rejected an offer of Ellis to prove by Bladen as a witness, that in a conversation between Bladen and Parker, in 1876, the latter stated "that the matter of the transfer of the lots by Mr. Ellis back to Parker and Hanway and the settlement of the matter had been concluded upon, and the whole matter adjusted between them."

There was evidence showing some negotiations of Ellis with Parker for the reconveyance by the former to Parker

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and Hanway of the ten lots described in the first ten paragraphs of the complaint; but the evidence did not show the accomplishment of such a result. The deed of conveyance would have been the best evidence to prove such a reconveyance. If it could not be produced, the offered statement of Parker, if it could be said to indicate a reconveyance, did not indicate any consideration therefor; and we do not find that there was any proper offer to show, or statement of an intention or profession of ability to show, a consideration for a reconveyance. The declaration of Parker was not offered as part of the *res gestæ* of any act or fact. Aside from its indefiniteness, it was hearsay as between Ellis and the appellee.

It is finally insisted that the court allowed the appellee compound interest. By computation we do not find this claim to be true.

The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed June 25, 1884.

No. 11,285.

THE BOARD OF COMMISSIONERS OF GREENE COUNTY v.
AXTELL.

COUNTY SUPERINTENDENT.—*Schools.—Office Rent.—County Not Liable for.—*

The county commissioners are not required to furnish the county superintendent with an office, nor, if such duty rested upon them, would they be liable to him, in the absence of a contract, for the use of his own office as such superintendent.

From the Greene Circuit Court.

L. Shaw and *J. S. Bays*, for appellant.

S. O. Pickens, *S. W. Axtell* and —. *Moffett*, for appellee.

BEST, C.—The appellee filed a claim against the appellant for the use of an office for the county superintendent.

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The second paragraph of the appellant's answer averred, in substance, that the appellee was the county superintendent and in the discharge of his duties he used his own office; that this was done without any contract whatever with the appellant, and that the claim filed was for the use of such office under such circumstances. A demurrer to this paragraph was sustained, and this ruling is assigned as error.

This paragraph constituted, as it seems to us, a complete defence to the action. No statute requires the commissioners of the county to furnish the superintendent with an office, and in the absence of such statute the county can not be required to furnish such office or to pay the superintendent for the use of his own office. The only statute requiring the commissioners to furnish offices is section 5748, R. S. 1881, and this section does not require them to furnish the county superintendent with one. It only requires offices to be furnished the clerk, recorder, treasurer and auditor. No such provision is made in behalf of the superintendent, and, in the absence of such provision, the commissioners are not required to furnish him an office. This conclusion is strengthened by the fact that the Legislature deemed it necessary to make such provision for the officers above named. Again, if such duty rested upon the commissioners, this action can not be maintained. In the absence of a contract, the county is not bound for the use of the appellee's office. He can not treat the use of his property by himself as an acceptance of such use by the county, and out of such use no assumption arises. No kind of contract can be made by a single contracting party. No one can sell for himself and at the same time buy for another. All such transactions are void. In the absence of a contract, the county was a stranger to the transaction, and was not liable to the appellee for the use he made of his property.

The demurrer to this paragraph was, therefore, improperly sustained, and for this error the judgment should be reversed.

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PER CURIAM.—It is therefore ordered, that the above judgment be reversed, at appellee's costs, with instructions to overrule the demurrer to the second paragraph of answer.

Filed June 25, 1884.

 No. 10,629.

COOPER ET AL. v. HAYES.

PLEADING.—*Joint Demurrer.*—*Practice.*—A demurrer "to the first and second paragraphs of the complaint, for the reason that the same, and neither one of the same, constitute a cause of action," is joint to both paragraphs, and if either be good the demurrer should be overruled.

ASSIGNMENT OF ERROR.—*Defects Cured.*—A joint assignment of errors, defective because the errors alleged were not errors against all the appellants, is cured by the declination of the parties against whom there is no error to join in the appeal.

WILL.—*Construction.*—A testator devised real estate to each of three sons, A., B. and C., which, upon the death of any without issue, should go to the "survivor or survivors," and, upon the death of any one with issue, the land devised to him should go to his children. A. died without issue, then B. died, leaving issue, a daughter, and then C. died without issue, with a widow surviving, to whom he devised all his lands.

Held, that on the death of C. the daughter of B. did not take the estate devised to C.

SAME.—*Former Adjudication.*—*Jurisdiction.*—*Judgment.*—*Title to Land.*—A judgment of a court in Ohio construing a will is not conclusive as to the title to lands in this State, though the title depends upon the construction of the will.

From the Dearborn Circuit Court.

G. Hoadley, E. M. Johnson, E. Colston, O. B. Liddell, H. L. Cooper, J. E. McDonald, J. M. Butler and A. L. Mason, for appellants.

J. D. Haynes, J. K. Thompson and C. F. Hayes, for appellee.

BICKNELL, C. C.—Joseph Hayes died seized of real estate in Dearborn county. He devised the same to his brother Abiah Hayes in trust for his son Enoch Hayes. He left three sons, of whom Enoch, the youngest, was twelve years old

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when his father died. The testator devised other lands to the same trustee in trust for each of his other sons.

The following are all the provisions of the devise which are material to the present controversy :

"Item 5th. I give and devise to my said brother, Abiah Hayes, in trust for, and to hold the legal title and estate for, my third son, Enoch Hayes, all my real estate which is situated in the county of Dearborn, Indiana, both lands and lots.

"Item 6th. In the above disposition of my property, so far as enumerated, I have aimed to make my three children equal in the distribution of my estate ; and, as neither of my children are of age, and neither of them married, my youngest son, Enoch, being about twelve years old, and my eldest son about eighteen years, I direct and request that, after my decease, they shall severally have the possession and the use of the lands devised to my said brother, Abiah Hayes, for the use of them severally, but have no right to sell or dispose of or incumber the same.

"And I further direct and will, that the legal title of all my real estate, so as above devised, shall remain and continue in the said Abiah Hayes, my brother, until my youngest son, Enoch Hayes, arrives at the age of twenty-one years ; and, at that period (except as hereinafter directed), I direct, and it is my will, that said trust estate in the said Abiah Hayes, my brother, shall cease and come to an end, and the real estate and other property devised to him in trust for my said sons, Van Hayes, Silas P. Hayes and Enoch Hayes, shall become legally, as well as equitably, vested in them, respectively, as above specifically devised ; and, on the arrival at age of said Enoch Hayes, I will that my said brother, Abiah Hayes, do convey to my said sons, Van, Silas and Enoch, respectively, the lands devised to him, as above, in trust for them respectively.

"But it is further my will, and I do hereby will and direct, that if at the time of arrival at full age of my son Enoch, my said brother, Abiah Hayes, shall have reason to fear, and

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shall believe that either of my sons will not take proper care of their property, or waste and squander the same, then I direct that the estate of such one, or either, or all of my sons, shall be still held in trust by my said brother until such time as, in his judgment, it is prudent and safe to convey their legal title respectively.

"It is my will, and I enjoin it upon my sons, that they retain and live upon the property I have devised for their use as long as they live, and that they each leave to their heirs the same property I have given to them unincumbered, and that they strive to increase and add to it, rather than to diminish or incumber it; and I further enjoin upon my sons so to conduct themselves as to their habits and attention to their business as to deserve the confidence of their uncle, Abiah Hayes, and entitle themselves to the legal title to the lands above devised at the earliest period consistent with my will.

"Item 7th. And I further will and direct, that, in case my brother, Abiah Hayes, shall die or become incapacitated from discharging the trusts so as above and hereinafter enjoined upon him, or in case he refuses to act and accept of said trusts, then, in that case, I will and devise to my cousin, Van Hayes, and my nephew, Isaac Hayes, the same lands and property, upon the same trusts as above enumerated, as to said Abiah Hayes, and I enjoin upon them, or the survivor of them, the same duties and trusts and responsibilities which I have provided for in the case my brother accepts of said trust, giving the same rights and enjoining upon them the same duties.

"Item 8th. It is further my will, and I hereby provide and direct, that, in case my youngest son, Enoch Hayes, shall die before he arrives at the age of twenty-one years, that the time when he would have become twenty-one years of age, if he had lived, shall be taken as the time referred to in item sixth, as to when said trust estate shall determine, subject to the conditions in item sixth.

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"Item 10th. In case of the death of either of my sons without children, I devise the share of such deceased son or sons to the survivors equally, the legal estate to remain in said trustee for the benefit of the survivors, subject to the same conditions as are provided for in the case of the property devised for their use and benefit; but, in case either of my sons shall die, leaving children, I devise the same property to their children, which I have respectively devised to my said sons; meaning that the children of any of my sons who shall die shall have the same property which is devised for the use of their father.

"Item 16th. I devise, and bequeath, and direct that all the rest and residue of my property, be it real or personal, not herein disposed of, shall be equally divided among my sons, share and share alike. My horses, cattle and hogs to be divided and distributed by my executors among my sons (except as above disposed of), and the money arising from my notes and debts due to me, to be collected by my executors, and equally divided among my sons, or the survivors of them, and paid to them, or invested for their several benefits, as my executors may at the time deem most for the interest of my sons, having reference to their ages and other circumstances."

Van Hayes the oldest brother died, leaving a daughter, Mary; Silas Hayes, the second brother, died without issue, and afterwards Enoch Hayes died without issue, leaving a widow, Ann Hayes, who has since married Samuel Cooper. Enoch Hayes, by his last will, devised the lands in controversy to his said widow. Mary Hayes, the daughter of Van Hayes and granddaughter of Joseph, now brings this suit against Enoch's widow and her present husband, and the trustees named in Joseph's will and others, to recover said land in Dearborn county and damages for the detention thereof.

The complaint is in two paragraphs. The first paragraph is in the usual form, alleging the equitable title and the right to the possession to be in the plaintiff, and that the defendants unlawfully and without right now detain, and for six

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years last past have detained, the possession from the plaintiff, to her damage \$7,000.

The second paragraph of the complaint sets forth the facts specially, with a copy of the will of Joseph Hayes and the letters testamentary granted thereon, and claims that under said will, when Enoch Hayes died without issue, the right to said lands devolved upon the plaintiff, and that said Enoch had no devisable interest therein, and that the trustees under said Joseph's will had never conveyed the legal title of said land to said Enoch, but had retained the same pursuant to the terms of said will, and that the defendants Cooper and wife now hold, and for six years last past have held, the possession of said lands against the plaintiff unlawfully and without right. This paragraph prays judgment for \$7,000 damages, and for the recovery of the land, and that said trustees be ordered to convey said land to the plaintiff, and that she may have all proper relief.

In this complaint the defendants Anna Cooper and Samuel Cooper filed a demurrer in the following form: "Now at this time come Samuel Cooper and Anna Cooper, defendants, and demur to the first and second paragraphs of plaintiff's complaint, for the reason that the same, and neither one of the same, constitute a cause of action against the said defendants herein named."

This demurrer was overruled, and this overruling is assigned as error in the first, second and third specifications of the assignment of errors.

This demurrer is not in the form required by the statute; it fails to state that the pleading demurred to does not contain facts sufficient, and being a demurrer to the entire complaint, and the first paragraph being good, there was no error in overruling the demurrer. *Pine Civil Tp. v. Huber, etc., Co.*, 83 Ind. 121, and cases there cited; *Stanford v. Davis*, 54 Ind. 45; *Meyer v. Bohlfig*, 44 Ind. 238; *Silvers v. Junction R. R. Co.*, 43 Ind. 435; *Washington Tp. v. Bonney*, 45 Ind. 77.

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The fourth specification of error is not mentioned in the appellants' brief, and is therefore regarded as waived.

The defendants, Isaac Hayes and Silas V. Hayes, the trustees, filed a counter-claim, alleging that they were entitled to a lien on said lands for \$1,273.36 for the balance of an account due them as trustees, and praying for the enforcement of said lien. The plaintiff answered this counter-claim by a general denial.

The defendants Anna Cooper and Samuel B. Cooper filed an answer in two paragraphs: 1st. The general denial. 2d. A special answer admitting the material facts stated in the complaint, and alleging a former adjudication of the same matter now in controversy, by the court of common pleas of Hamilton county, Ohio, upon a petition of said trustees for a construction of the will of said Joseph Hayes, to which petition the present plaintiff and said Anna Hayes, now Anna Cooper, were defendants.

The plaintiff filed a demurrer to the said second paragraph of the answer of Cooper and wife, and said demurrer was sustained by the court.

The defendants in the suit were Anna Cooper, Samuel B. Cooper, Abiah Hayes, Isaac Hayes, Silas V. Hayes, Stephen B. Hayes and Mary Hayes. The defendants, Abiah Hayes, Stephen B. Hayes and Mary Hayes, failed to appear and were defaulted. The cause was tried by the court upon the complaint, the default aforesaid, the general denial of the defendants Cooper and wife, the counter-claim of the defendants Isaac Hayes and Silas V. Hayes, and the plaintiff's denial of said counter-claim. The court found for the plaintiff, with damages against Cooper and wife, \$4,560, and against Anna Cooper the further sum of \$1,161.18, and that the trustees were entitled to a lien on the land for \$1,273.36.

Cooper and wife moved for a new trial; this motion was overruled; judgment was rendered on the finding in favor of the plaintiff against all the defendants, and for the enforcement of the counter-claim of the trustees.

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To the rendering of this judgment the defendants excepted, and prayed an appeal.

The assignment of errors was originally defective, because it was a joint assignment by all the appellants, and the errors alleged were not errors against all the appellants. *Feency v. Mazelin*, 87 Ind. 226; *Eichbredt v. Angerman*, 80 Ind. 208. But after the making of the assignment of errors, all of the defendants except Anna Cooper and Samuel B. Cooper declined to join in the appeal. This cures the defective assignment of errors, and enables this court to consider the two questions presented in the brief of the appellants, namely, what is the proper construction of the will of Joseph Hayes? and was the defence of former adjudication sufficient?

It appears by said will that the testator "aims to make his three sons equal in the distribution of his estate," and that he means "in case the sons die leaving children, to give to the children respectively the same property devised to their fathers."

He devises certain lands to trustees for the use of his eldest son, Van Hayes; certain other lands to the same trustees for the use of his second son, Silas P. Hayes; and certain other lands to the same trustees for the use of his youngest son, Enoch.

As these sons were all minors and unmarried, he declares in item six of the will, that after his death they shall severally have the use of and the possession of the lands devised for their benefit respectively, but shall have no right to sell, dispose of, or incumber the same, but that the legal title of all the lands shall remain in the trustees until the youngest shall come of age, and that then *the trust shall cease* (except as hereinafter directed), and the *property* shall become legally as well as equitably vested in the children respectively; and that on the arrival at age of said Enoch, the trustees shall convey to each child the property held in trust for him. If the three sons had all been alive when Enoch came of age,

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and if the exception mentioned in item six of the will had not arisen, there would have been no difficulty, the trust would have come to an end at Enoch's majority.

But the exception above mentioned did arise. The trustees did fear that the estate might be squandered, and, therefore, on Enoch's coming of age, the trust did not cease, but the trustees continued to hold the legal estate of all the lands, under the will, until Enoch died. He died December 1st, 1875, without issue. In the meantime Silas P. Hayes, the second son, died on March 26th, 1867, without issue, and Van Hayes, the eldest son, died on December 8th, 1869, leaving a daughter, the present plaintiff.

When Enoch died the trust came to an end; the use and the possession could no longer be kept apart.

The eighth item of the will provides that if Enoch shall die before attaining the age of twenty-one years, then the time when he would have become twenty-one years of age if he had lived shall be taken as the time when the trust shall determine, subject to the exception aforesaid.

Enoch having lived more than twenty-one years, and the trustees having continued to hold all the lands until his death, by virtue of the exception aforesaid, when Enoch died, more than twenty-one years old, the trust was necessarily determined.

The supposed difficulty in the will arises upon a question of survivorship.

The tenth item of the will provides as follows:

"10th. In case of the death of either of my sons without children, I devise the share of such deceased son or sons to the survivors equally, the legal estate to remain in the trustees for the benefit of the survivors, subject to the same conditions as are provided for in case of the property devised for their use and benefit." The word "survivors" here means the survivors of the sons.

Under this clause, when the son Silas P. Hayes died with-

out children, the trustees held his share for the benefit of the testator's two surviving sons, Van and Enoch, and if Van had died without children, the trustees would have held all the property for the benefit of the survivor Enoch.

But the tenth item of the will provides for another case, as follows: "If either of my sons shall die leaving children, I devise the same property to their children which I have respectively devised to my said sons, meaning that the children of any of my sons shall have the same property which is devised for the use of their father."

While Van and Enoch were alive, the trustees, after the death of Silas P., were holding for the separate benefit of Van and Enoch the shares devised to them respectively, and were holding for the joint benefit of Van and Enoch the property which had been devised for the use of Silas P. If Van had died without children, the trustees would have held the entire property, all three of the shares, for the benefit of the survivor Enoch. But Van died leaving a daughter; clearly she is entitled to all that her father had when he died; the will says she shall have the same property herein devised for the use of her father. There was nothing devised for the use of her father except his own share and what came to him by survivorship on the death of his brother, Silas P. He had a possibility of getting more by surviving his brother Enoch, but he did not survive his brother Enoch; therefore he took nothing by that possibility and had nothing in Enoch's share to transmit to his daughter. So that, after the death of Van, so long as Enoch lived, the trustees were holding for the use of Enoch his own share, and for the use of Van's daughter the share originally devised to Van, and for the joint use of Enoch and Van's daughter they were holding the share originally devised to Silas P.; then Enoch died, and now in this suit Van's daughter, the plaintiff, is claiming under the will that she is not only entitled to the property which her father had, but also to that which her uncle Enoch had when he died, but this claim is directly in conflict with

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the plain language and meaning of the will. It is impossible to express more clearly than this will does the intention of the testator that the children of his sons who shall die shall take the property devised to their parents. "My meaning" is, says the testator, "that the children of any of my sons shall have the same property which is devised for the use of their father." There is not a word in the will indicating that Van Hayes' possibility of survivorship, which he lost when he died, because Enoch survived him, should be revived and extended to his daughter. To give the plaintiff what her uncle Enoch took under the will would be giving her more property than was devised for the use of her father, either directly or indirectly, and would contradict the plain words and intention of the will.

Where the intention of a will is plain and violates no rule of law, there is no need of resorting to any technical rules. In Indiana, the intention of the testator, gathered from all parts of the will taken together and forming a consistent whole, must govern. *Jackson v. Hoover*, 26 Ind. 511; *Grimes v. Harmon*, 35 Ind. 198 (9 Am. R. 690); *Fraim v. Millison*, 59 Ind. 123; *Critchell v. Brown*, 72 Ind. 539.

The judgment of the court below was contrary to the evidence and contrary to law. The court erred in overruling the motion for a new trial, and for this reason the judgment ought to be reversed.

We think there was no error in sustaining the demurrer to the second paragraph of the answer of Cooper and wife. The Ohio court had no jurisdiction to determine the title to lands in Indiana, and the trust being terminated by the death of Enoch Hayes, there was nothing remaining to be enforced or construed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the cost of the appellee, and this cause is remanded for a new trial.

Filed April 4, 1884.

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ON PETITION FOR A REHEARING.

BICKNELL, C. C.—This case may be briefly stated as follows: A. died seized of three parcels of real estate, which, by his last will, were devised to a trustee in trust, one parcel for each of the testator's three sons, with the direction that each son should have the possession and use of his parcel during the continuance of the trust.

The will provided also that the legal estate of all the parcels should remain in the trustee until Enoch, the youngest son, should come of age, or, if he should die a minor, until the time when he would have come of age if alive, and that then said trust should come to an end, and each son should have the legal title to his own parcel, unless the trustee should be of opinion that they would be likely to waste and squander their property, in which event the trustee should continue to hold the legal title until he should deem it prudent and safe to convey it to the sons respectively.

The will then expresses a hope that the sons will reside on their said parcels of land, and will try to increase their property, and to deserve the confidence of their trustee, so that they may gain the legal title at the earliest time provided by the will.

The will then provides that if, pending the trust, any of the sons shall die without issue, his parcel shall go to the surviving sons; but that, if he die leaving children, his share shall not go to the surviving sons, but to such children; and in order that there may be no mistake about the testator's meaning, the will declares "my meaning is that the children of any of my sons who shall die shall have the property devised for the use of their father."

As was stated in the principal opinion, it is impossible to express more clearly than is here expressed the intention of the testator as to what his grandchildren should take on the death of their parents pending the trust. They are to take the same property devised to the use of their father, and no

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more. There is not a word in the will giving a grandchild any part of an uncle's share, or any other part than its father's share. *Expressio unius est exclusio alterius.*

The foregoing provisions qualify the trust; when the trust comes to end the parties are to be invested with the legal estate.

If, when Enoch comes of age, the three sons are all alive and worthy, the trust comes to an end, and the sons are each to have the legal title to his own parcel. If one of them dies pending the trust, without issue, then his share is to be held by the trustee for the benefit of the surviving sons; but upon such a death, leaving issue, then the issue is to take its father's share, and that is all of it. This matter was fully stated in the principal opinion.

The facts are that Silas P. Hayes died on March 26th, 1867, without issue; thereupon his share was held by the trustee for the benefit of the survivors, Van Hayes and Enoch Hayes. Afterwards Van Hayes died, leaving a daughter, the present plaintiff; thereupon the trustee held, for the benefit of the plaintiff, just what was held for the benefit of her father at the time of his death, viz., his own parcel and one-half of what was devised for the use of Silas P., who died first. Finally, Enoch died, having bequeathed all his property to his widow. The plaintiff is now in this action seeking to recover the share of her uncle Enoch, after the determination of the trust, in violation of the express language and manifest intention of her grandfather's will.

The cases cited in the principal opinion are decisive of this case. The intention of the testator, gathered from all parts of the will, and forming a consistent whole, devoid of all obscurity and violating no law, must govern.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition is overruled.

Filed June 25, 1884.

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No. 11,155.

HAMILTON ET AL. v. BARRICKLOW ET AL.

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SUPREME COURT.—Practice.—Parties.—A party against whom no judgment has been rendered will not be heard upon assignment of errors made by him in the Supreme Court.

NOTICE.—Non-Resident.—Publication.—Affidavit.—An affidavit that a defendant is a non-resident of the State, and a necessary party, and that the action is in relation to real estate, was, under section 38, 2 R. S. 1876, p. 49, sufficient to warrant notice by publication.

CONTRACT.—Complaint.—Joinder of Causes.—Declaring Lien.—Fraudulent Conveyance.—In a suit upon a contract, the complaint may also, by virtue of section 280, R. S. 1881, embrace such other matters as may be necessary for a complete remedy, *e. g.*, decreeing a lien or charge on real estate, or setting aside a fraudulent conveyance.

SAME.—Conveyance for Support during Life.—Equity.—Charge upon Lands.—Demand.—C. conveyed lands to E. in consideration that E. would pay his debts and support him during life, but E. refused, after receiving the deed, to put her contract so to do in writing, as she had agreed. She failed both to support C. and to pay his debts.

Held, that equity would charge the lands with E.'s support and with his debts, and that no demand of payment by C.'s creditors was necessary.

DEED.—Consideration.—Parol Evidence.—Parol evidence is admissible to show what was the consideration for a deed.

SUPREME COURT.—Issues.—Parties.—A party can not complain on appeal that issues were not formed between other contending parties in the same suit, where such issues could not affect the interests of such appellant; nor can such appellant complain that the appellee dismissed his suit against another defendant thereto.

From the Ohio Circuit Court.

J. B. Coles, for appellants.

A. C. Downey, for appellees.

FRANKLIN, C.—In March, 1881, John A. Hamilton commenced, in the Ohio Circuit Court, a suit against Charles E. Hamilton and his son and son's wife, Charles and Elizabeth Hamilton, on some promissory notes executed by said Charles E. and Charles Hamilton, and to set aside a fraudulent conveyance of real estate from said Charles E. to Elizabeth. Charles E. was a resident of said county, and upon whom

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process was served. Charles and Elizabeth were non-residents, and as to them publication was made. John A.'s suit was for himself and on behalf of all other creditors. Upon proof of publication being filed, Henry Barricklow and Lena Barricklow each filed a separate complaint against the same defendants, asking to be made parties to said John A.'s suit. The non-resident defendants, by attorney, appeared specially and moved to set aside the process and publication, and to dismiss and strike from the files the complaints of Henry and Lena Barricklow, which motions the court overruled. John A. Hamilton dismissed his cause of action. Lena Barricklow dismissed her complaint, and Henry Barricklow dismissed his cause of action against Charles Hamilton after he had been defaulted. Elizabeth Hamilton then filed a cross complaint against John A. Hamilton, Lena Barricklow, Henry Barricklow, and Charles E. Hamilton, alleging that she owned the land; that the defendants were slandering her title thereto, and asking to have her title quieted to the same. No process was issued upon her cross complaint. August 14th, 1882, Henry Barricklow filed an additional second paragraph to his complaint, alleging that the consideration of the deed from Charles E. to Elizabeth was the agreement of Elizabeth to pay all of Charles E.'s debts and furnish him a comfortable support in her family upon the farm during his natural life; that she had agreed to reduce the same to writing, but upon receiving the deed for the farm had refused to execute the written agreement for the consideration, and had failed to fulfil it.

Elizabeth moved to strike out this paragraph of complaint, which was overruled.

Charles E. Hamilton filed a cross complaint against Elizabeth and Henry Barricklow, alleging more minutely, but substantially, the facts stated in Henry Barricklow's second paragraph of his complaint.

After various motions and demurrers were overruled, issues were finally closed upon the complaint of Henry Bar-

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ricklow, and the cross complaints of Elizabeth and Charles E. Hamilton.

There was a trial by the court, and at the request of Elizabeth, the court made a special finding and stated its conclusions of law in favor of the plaintiff Barricklow, against Charles E., and that his claim be a charge and lien upon the land as against Elizabeth; and in favor of Charles E. upon his cross complaint against Elizabeth, and against Elizabeth upon her cross complaint.

She excepted to the conclusions of law, and moved for a *venire de novo*, and for a new trial, which motions were overruled and judgment rendered upon the finding and conclusions of law. A motion to modify the judgment was also overruled. The errors assigned are as follows:

1. Overruling motion to quash and set aside service of process by publication.
2. Overruling motion to strike complaint of Henry Barricklow from files.
3. Overruling motion to strike out second paragraph of Henry Barricklow's complaint.
4. Overruling motion to dismiss Henry Barricklow's action as to appellant Elizabeth.
5. Overruling demurrer to Henry Barricklow's complaint.
6. Overruling demurrer to each paragraph severally of Henry Barricklow's complaint.
7. Overruling demurrer to cross complaint of Charles E. Hamilton.
8. Overruling demurrer to second paragraph of cross complaint of Charles E. Hamilton.
9. Error in conclusions of law.
10. Overruling motion for a new trial.
11. Overruling motion for *venire de novo*.
12. Overruling motion to modify judgment.
13. In permitting Barricklow to dismiss his action as to Charles Hamilton, Jr.

The foregoing errors are assigned separately by Elizabeth.

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Charles has also assigned separate errors. But as the cause was dismissed as to him, and no judgment rendered against him, there is nothing for him to appeal from or upon which to assign errors. His assignment will, therefore, not be considered.

The objection to the process is that the affidavit for publication is not sufficient. The affidavit stated that the defendants Charles Hamilton and Elizabeth Hamilton were non-residents of the State of Indiana; that a cause of action existed against them; that they were necessary parties to the action, and that the action was in relation to real estate.

Under the provisions of the 38th section of 2 R. S. 1876, p. 49, this affidavit is sufficient. And under the 72d section of said statute a cause of action to set aside a fraudulent conveyance or have a lien declared on real estate, the same as the foreclosure of a mortgage, may be properly joined with a cause of action for the collection of the claim sought to be secured.

These provisions of the statute dispose of the first four specifications of error against appellant.

The next four specifications are in relation to the pleadings, which are too numerous and lengthy to copy into an opinion.

We have examined the pleadings and rulings thereon, and find no substantial error therein, and think it unprofitable to encumber this opinion by setting them forth and discussing them.

The ninth specification alleges error in the conclusions of law. The special findings of the facts are, substantially, as follows:

On the 17th day of October, 1871, Charles E. Hamilton conveyed, without consideration, the land in controversy to Charles Hamilton.

On the 29th day of January, 1873, the said Charles gave to the said Charles E. a mortgage on said real estate to secure the payment of three several promissory notes for \$2,500 each, payable March 1st, 1874, March 1st, 1875, and March 1st, 1876.

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On June 8th, 1874, said Charles and Elizabeth, his wife, conveyed said lands to said Charles E., and the said mortgage was then entered satisfied.

On August 19th, 1874, said Charles E. conveyed said lands to said Elizabeth, including a large amount of personal property—the real estate worth \$6,000, and the personal property worth \$700; that said conveyance was on the condition and for the consideration that said Elizabeth would maintain and support the said Charles E. during his life, and furnish him a home in the dwelling-house on said real estate, and would pay all the debts of said Charles E.; that she then agreed and promised to reduce said conditions and agreement to writing, sign and deliver the same to said Charles E. After said conveyance the said Charles E. had no other property except a bed and bedding, and a life-estate in fifty acres of land of the rental value of \$75. Said Elizabeth and Charles, her husband, took possession of the property so conveyed immediately, and resided on said real estate until the 24th day of November, 1880, and furnished the said Charles E. a home in the dwelling-house on said real estate, and a comfortable support during the time the said Elizabeth and Charles resided on said real estate; that on the said 24th day of November, 1880, said Elizabeth and Charles moved from said real estate to the State of Illinois, where they have ever since said time and do now reside; that since they so moved to the State of Illinois, they have failed to furnish the said Charles E. a comfortable support; that since their absence the said Charles E. has occupied, and does now occupy, said dwelling-house; and during said time said Elizabeth has rented and received the rents of said real estate; that the rental value of said real estate is \$300 per annum, and the dwelling and garden \$40; that at the time of said conveyance to said Elizabeth, the said Charles E. and Charles, Jr., were indebted to the plaintiff, Henry Barricklow, in the sum of \$250, which was a part of the debts that said Elizabeth agreed and promised to pay in part consideration for said real estate and personal property

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so conveyed to her by said Charles E. ; that there is now due and owing said plaintiff on said debt the sum of \$371.74.

The finding then states an indebtedness to Lena Barricklow existing at the time of said conveyance of \$369.55 ; that said Elizabeth failed and neglected to pay said indebtedness to said Henry and Lena Barricklow, and has failed and refused to reduce the said conditions and agreement to writing, that she would pay the debts of said Charles E. and furnish him a home and comfortable support upon said real estate during his lifetime, and sign and deliver the same to said Charles E. ; that said Elizabeth and Charles executed, and gave to said Charles E., their notes for \$11,200, the amount of the consideration named in the deed, and executed a mortgage on the said real estate to secure their payment, which was never recorded ; that it was not the intention of the parties at the time that the notes and mortgage should be paid, and which were afterwards surrendered and cancelled ; that said Elizabeth and Charles were not compelled by violence, threats and persecutions of said Charles E., to leave said real estate and move therefrom ; that the annual cost of the support and maintenance of the said Charles E., in said dwelling-house upon said real estate, is \$250, which, from the 24th day of November, 1880, to the 15th day of August, 1882, is \$492.50 ; that from different sources he had received \$193 ; that said Elizabeth has no other property in this State except her interest in said real estate ; that said Charles has no property in this State subject to execution ; that said Charles and Elizabeth are husband and wife. Upon which the court stated the following conclusions of law :

"First. That the plaintiff Henry Barricklow is entitled to recover of and from Charles E. Hamilton and Charles Hamilton the sum of \$371.34 ; and that the said sum, being a part of the consideration for the purchase-price of the real estate described in plaintiff's complaint and conveyed by the said Charles E. Hamilton to said Elizabeth Hamilton by deed dated August 19th, 1874, is a charge upon said real estate.

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"Second. A similar conclusion as to Lena Barricklow.

"Third. That as to the issue between Charles E. Hamilton and Elizabeth Hamilton, the court finds for the said Charles E. Hamilton, that there is due him from said Elizabeth Hamilton the sum of \$293.21, for his support and maintenance from the 24th day of November, 1880, to the 15th day of August, 1882, and that the same is a charge upon said real estate conveyed by said Charles E. Hamilton to Elizabeth Hamilton by deed dated August 19th, 1874, and to be realized therefrom.

"Fourth. That the said Charles E. Hamilton is entitled to reside in the dwelling-house on said real estate conveyed by him to Elizabeth Hamilton by deed dated August 19th, 1874, and recover from her each year of his natural life, from the 15th day of August, 1882, for his support and maintenance, the sum of \$286; said sum is a charge upon said real estate and to be realized therefrom; and that the action pending by appeal in this court by said Elizabeth Hamilton against said Charles E. Hamilton, to recover possession of the house on said land, ought to be perpetually enjoined.

"Fifth. That the plaintiff, Henry Barricklow, ought to recover from the defendant his costs of this suit.

"Sixth. As to the issue between Charles E. Hamilton and Elizabeth Hamilton, the said Charles E. Hamilton is entitled to his costs."

The record shows that as to the complaint of Henry Barricklow, Charles E. Hamilton was personally served with process, and Elizabeth Hamilton was notified by publication; that she appeared to the action and answered, and filed a cross complaint against Barricklow, Charles E. and others; no process was issued as to the others. Upon her cross complaint issues were formed as to Henry Barricklow, Charles E. and Elizabeth Hamilton. She also appeared to and answered the cross complaint of Charles E. Hamilton; and as to these three, Barricklow, Charles E. and Elizabeth, the court had jurisdiction of the persons and subject-matter of the suit,

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and the power and right to settle the whole matter in controversy between them. As to Lena Barricklow, she had dismissed her cause of action, and was then not before the court claiming anything. The finding and conclusions of law as to her must be considered as erroneous, and a nullity in so far as they affect the rights of those who were properly before the court.

The conclusions of law, so far as they affect the rights of Henry Barricklow, Charles E. Hamilton and Elizabeth Hamilton, appear to be fully sustained by the findings. *State, ex rel., v. Kelso*, 94 Ind. 587.

A special demand to pay the debts which she had agreed to pay as a part consideration for the land was not necessary to be averred in the pleadings or proved on the trial.

We see no available error in the conclusions of law as to these three parties; they are certainly equitable and well calculated to administer justice to each of the parties under the peculiar circumstances of this case.

Of the nineteen reasons stated for a new trial, we only notice such as are presented by appellant in her brief. The fifth is the first one presented, and that is an objection to the introduction in evidence of the notes in favor of Lena Barricklow. This was irrelevant and erroneous, but could not affect the issues between the parties in the cause before the court, and as to them could not be a cause for the reversal of the judgment.

The sixth is expressly waived.

The seventh and seventh and a half are objections to the introduction of parol testimony to prove the consideration of the deeds. There was no error in these rulings.

The eighth is an objection to the notice of Charles E. to Elizabeth of her forfeiture of all rights under the deed to possession of the premises, on account of its being served upon an agent. The notice was competent evidence, but whether the agent occupies a position to bind the principal was a question to be considered in deciding the case.

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The ninth is that the finding is not sustained by the evidence and is contrary to law. The evidence is contradictory and very conflicting, but there is evidence clearly tending to support the findings, and this court will not weigh it so as to determine its preponderance, and we do not see wherein the findings are contrary to law.

The twelfth is that the finding in favor of Lena Barricklow is too large. While that may be true, it can not affect the judgments in favor of the plaintiff and appellee Charles E. Hamilton.

The fourteenth, fifteenth, sixteenth and seventeenth reasons were for the failure to form issues between Barricklow and Charles E. Hamilton, and Charles E. Hamilton and Charles Hamilton on Charles E.'s cross complaint. Charles was not made a party thereto by process or appearance, and there was no issue to form as to Charles, Barricklow's complaint having been dismissed as to him. Charles E.'s cross complaint was consistent and agreed with the second paragraph of Barricklow's complaint, and needed no issue. Appellant Elizabeth has no right to complain of the want of such issues.

The eighteenth is for modifying the conclusions of law so as to perpetually enjoin appellant Elizabeth from the further prosecution of her appeal then pending in said court for possession of the house and premises in controversy. This was within the issues between Charles E. and Elizabeth. The court had jurisdiction of the parties interested and of the whole subject-matter, and we do not think that there was any error in making a final determination of all the matters then in controversy in the suit.

The nineteenth reason is an objection to the court permitting Henry Barricklow to dismiss his cause of action against Charles Hamilton. We do not see wherein appellant Elizabeth has a right to complain of this. If the plaintiff did not desire a personal judgment against Charles, he had a right to dismiss as to him. The controversy about the land affected

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Elizabeth's separate property only. There is no error in overruling the motion for a new trial.

The last specification of error complained of is the overruling of appellant's motion to modify the judgment. In this appellant objects to the appointment of a receiver, and the taking of the possession of the land from her, and also the rendering of the judgment in favor of Lena Barricklow after she had dismissed her suit.

As to the first two modifications asked, we think there was no error in overruling the motion; but as to the third, after Lena Barricklow had dismissed her cause of action and was no longer a party to the controversy, the court had no right to render any judgment in her favor. She is made a party appellee to this appeal, and has been served with notice.

The judgment in her favor ought to be reversed, and as to the other parties the judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment in favor of Lena Barricklow be and it is in all things reversed; and that the judgment in favor of Henry Barricklow, and the claim adjudicated in favor of Charles E. Hamilton, and that they both be declared a lien and charge upon the land as against Elizabeth Hamilton, be and the same are in all things affirmed, with costs.

Filed April 25, 1884. Petition for a rehearing overruled June 25, 1884.

No. 11,730.

STOUT v. THE STATE.

CRIMINAL LAW.—*Defective Indictment.*—*Refusal to Quash.*—*Error.*—Under section 1756, R. S. 1881, the refusal to quash an indictment for a defect or imperfection therein, which does not tend to the prejudice of the substantial rights of the defendant upon the merits, is not an available error for the reversal of the judgment.

SAME.—*Intoxicating Liquor.*—*Unlawful Sale of Beer.*—*Evidence.*—*Presumption.*—Where the defendant is prosecuted for an unlawful sale of intoxicat-

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ing liquor, and upon the trial the evidence shows a sale of beer under circumstances which would make the sale unlawful if the beer was intoxicating, it will be presumed, in the absence of evidence to the contrary, that the beer so sold was a malt or an intoxicating liquor.

SAME.—Instructions.—Supreme Court.—Instructions to the jury are construed by the Supreme Court, with reference to each other and as an entirety; and if, thus construed, they present the law fairly and correctly, and are not calculated to mislead, they will afford no sufficient ground for the reversal of the judgment, although some of the expressions therein, if they stood alone, might be erroneous.

SAME.—Argument of Counsel.—Reading Law to Jury.—As the Constitution of this State, in all criminal causes, makes the jury the ultimate judges of the law, there is no error in permitting counsel, in argument to the jury, to read and discuss the law applicable to the case.

From the Monroe Circuit Court.

J. R. East and *W. H. East*, for appellant.

F. T. Hord, Attorney General, *J. E. Henley*, Prosecuting Attorney, and *W. B. Hord*, for the state.

HOWK, J.—In this case the indictment charged that, on the 15th day of September, 1883, in Monroe county, the appellant, Daniel A. Stout, “did then and there unlawfully sell to one Samuel Stephens intoxicating liquor, to be drunk and suffered to be drunk in the house, out-house, yard, garden, and the appurtenances thereto belonging of the said Daniel A. Stout, where the same was sold, to wit, one quart of beer, at and for the price of fifteen cents, he, the said Daniel A. Stout not then and there having a license to sell such intoxicating liquor to be drunk, or suffered to be drunk, in his said house, out-house, yard, garden, and the appurtenances thereto belonging, contrary to the form of the statute,” etc.

Upon the appellant’s arraignment and plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty as charged in the indictment, and assessing his punishment at a fine of \$20. Over his motion for a new trial, and his exception saved, the court rendered judgment on the verdict.

Errors are assigned here by the appellant which question

the decisions of the circuit court in overruling his motion to quash the indictment and his motion for a new trial.

By the indictment in this case it was intended, no doubt, to charge the appellant with the second of the two misdemeanors, which are defined and their punishment prescribed in section 5320, R. S. 1881. So far as applicable to the case in hand, this section provides as follows: "Any person, not being licensed according to the provisions of this act, * * * who shall sell or barter any spirituous, vinous, or malt liquors to be drunk or suffered to be drunk in his house, out-house, yard, garden, or the appurtenances thereto belonging, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be fined in any sum not less than twenty dollars nor more than one hundred dollars, to which the court or jury trying the cause may add imprisonment in the county jail of not less than thirty days nor more than six months."

The appellant's counsel claim that the indictment is bad, and ought to have been quashed. Counsel say: "The negative averment is not sufficient; treating the averments in the indictment as true, yet there may not have been any crime committed. The appellant may have had a license to sell in the house, out-house, yard and garden, and not on the appurtenances; in other words, the indictment alleges that he did not have a license to sell to be drunk in *all* of these places. That is the plain and ordinary meaning of the language used in the indictment. If the conjunction *and* had been *or*, the indictment would be good; the negation would then be sufficient." This is the entire argument of counsel in support of the only objection they have pointed out to the sufficiency of the indictment. We are not convinced by their argument that their objection to the indictment is well taken. In support of their position counsel cite *Stockwell v. State*, 85 Ind. 522, but that case is against them rather than in their favor. In section 1756, R. S. 1881, it is provided, in effect, that no indictment shall be quashed for any defect or imperfection

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therein, which does not tend to the prejudice of the substantial rights of the defendant upon the merits. It can not be said, we think, that the defect or imperfection pointed out by counsel in the indictment in this case tended even remotely to the prejudice of the substantial rights of the appellant upon the merits. The court did not err, therefore, in overruling the motion to quash the indictment.

Under the alleged error of the court, in overruling the appellant's motion for a new trial, the point is made by his counsel, that the verdict was not sustained by sufficient evidence, because, they say, the evidence failed to show that the beer sold by appellant was a malt or an intoxicating liquor. This point is settled adversely to the appellant, in the recent case of *Myers v. State*, 93 Ind. 251, wherein it was held substantially, that when the evidence shows a sale of beer under circumstances which make the sale unlawful, it will be presumed, in the absence of any showing to the contrary, that the beer so sold was a malt or an intoxicating liquor. In speaking of the evidence in the cause, appellant's counsel say: "It is true, here is proof of a sale of beer, and, while the evidence is not very strong, it might be sufficient to sustain the charge, if the beer had been proved to be intoxicating." In this case, however, there being no evidence to the contrary, the presumption must be indulged that the beer sold by appellant was a malt or an intoxicating liquor. This objection to the evidence not being well taken, we are justified in saying that appellant's counsel concede the sufficiency of the evidence to sustain the conviction.

With this concession of counsel in view, we proceed to the consideration of the error complained of by the appellant, in the instructions given by the court, of its own motion. It may be conceded that the instructions, as they appear in the record, are inaccurate and uncertain. Construed together, however, as an entire charge, as they must be, we do not think there was any such error in the instructions, or either

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of them, as could possibly mislead the jury or prevent the defendant from obtaining, at their hands, a just, fair and impartial verdict. Besides, as the cause seems to us to have been fairly tried on its merits, and as it is conceded that the conviction of the appellant was sustained by sufficient evidence, the instructions of the court, even though erroneous, would not authorize or justify the reversal of the judgment. *Cussady v. Magher*, 85 Ind. 228; *Norris v. Casel*, 90 Ind. 143; *Cheek v. City of Aurora*, 92 Ind. 107; section 1891, R. S. 1881.

The last cause assigned for a new trial, in appellant's motion therefor, was that "the court erred in allowing the prosecuting attorney, in his closing argument to the jury, to read to the jury the case of *Stockwell v. State*, 85 Ind. 522, as the law bearing on the case on trial." This cause for a new trial is not shown to be true, as stated, by the bill of exceptions appearing in the record. The bill states, "that the court permitted William P. Rogers, Esq., an attorney for the State, in his closing argument to the jury, to read to the jury the case of *Stockwell v. State*, *supra*, stating to the court and jury at the time that he read said decision as part of his argument." The action of the court, as thus stated, was not erroneous. Section 19 of the bill of rights, in our State Constitution, makes the jury in all criminal causes the ultimate judges of the law as well as of the facts. *Keiser v. State*, 83 Ind. 234. It is proper, therefore, that counsel should be permitted by the court to read and discuss the law in their arguments to the jury, on the trial of a criminal cause. *Lynch v. State*, 9 Ind. 541; *Harvey v. State*, 40 Ind. 516.

The court did not err in overruling appellant's motion for a new trial.

The judgment is affirmed, with costs.

Filed June 21, 1884

Henry *et al.* v. Carson.

No. 10,718.

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VENDOR AND VENDEE.—Deed.—Delivery.—Fraud.—A deed never delivered, but obtained without the knowledge or consent of the grantor, does not divest the grantor's title, and a subsequent purchaser from the grantee without notice for value will not be protected.

SAME.—Rescission of Contract.—Notice.—Demand.—Quieting Title.—Complaint.

—C. contracted to sell land to M., a deed to be delivered on payment of a certain instalment of the purchase-money. The deed was prepared and left with C.'s attorney to be delivered on such payment. No payment was ever made, and the deed was not delivered, M. abandoning the purchase. The deed was in some manner improperly obtained and recorded, and there was then a regular chain of conveyances down to H. C. was absent from the country and knew nothing of these transactions.

Held, that the complaint by C. against H. to quiet title, averring these facts, was good on demurrer.

Held, also, that a subsequent suit by C. against M. for the purchase-money, brought by his attorney without his knowledge, resulting in a judgment and the collection of a part of it by said attorney, none of which, however, came to C.'s hands, was not such an affirmation of the contract of sale as would bar the action or require notice of rescission or demand of possession.

JUDGMENT.—Confiscation.—Void Decree.—Jurisdiction.—Jurisdiction of proceedings to confiscate property, under the act of Congress of July 17th, 1862, 12 U. S. Statutes at Large, 589, could not exist without a prior seizure of the property by executive order, and this must appear by the record.

SAME.—Default.—Where the owner of such property appeared and answered, and his appearance and answer were stricken out and judgment entered by default for the want of an affidavit of his loyalty, the judgment is void.

PRACTICE.—Evidence.—Harmless Error.—The admission of irrelevant and immaterial evidence is a harmless error.

From the Madison Circuit Court.

J. H. Mellett, E. H. Bundy, C. L. Henry and H. C. Ryan,
for appellants.

M. S. Robinson and J. W. Lovett, for appellee.

BICKNELL, C. C.—James Carson brought this suit against Charles L. Henry. The complaint was in two paragraphs. The first was in the statutory form, demanding the possession

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of land and damages for its detention. The second averred that the plaintiff, on the 18th of August, 1860, made a contract with Moses Moreland and William Moreland, to sell them the land in controversy and make them a deed therefor on the 25th of December then next, on payment by them of the purchase-money in pursuance of the contract; that plaintiff and his wife, then residents of Tennessee, made and acknowledged a deed for said land, to be tendered to said Morelands on payment of the purchase-money, and placed the same in the hands of the plaintiff's attorney, to be delivered to said Morelands on their payment of said purchase-money, and not otherwise; that said deed was not delivered by said attorney, nor by plaintiff, nor by anybody having authority therefor, either to the said Morelands or to anybody for their use, but was fraudulently obtained by some person unknown, and without any lawful authority was recorded in said county of Madison, thirteen years after its date, without the knowledge of the plaintiff, and that plaintiff never knew of such recording until immediately before the commencement of this suit; that in January, 1865, said Morelands and their wives made a deed for said land to Benjamin F. Alexander, who, with his wife, made a deed therefor to Hardy and Russell, on the 2d of March, 1865; that the deed to said Alexander was not recorded until 1871, and said deed to Hardy and Russell was not recorded until 1876; that on April 2d, 1866, said Russell and his wife conveyed the land to said Hardy by deed recorded in 1868; that on February 4th, 1880, said Hardy conveyed the land to Bailey Davis, who, on December 23d, 1881, conveyed the same to the defendant Henry, who is now in possession thereof; that plaintiff never received any consideration for said deed to the Morelands, who failed to comply with and abandoned said contract, and forfeited all their rights under it, and that said Benjamin F. Alexander, and all claiming under him as aforesaid, took possession of said land without any right and without the plaintiff's knowledge or consent; that in the spring of 1861 the plaintiff removed

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from Tennessee to Arkansas, and lived there until August 20th, 1866; that from 1861 to August 20th, 1866, hostilities existed between the United States and the States of Tennessee and Arkansas, as parts of the Southern Confederacy, but plaintiff never renounced his allegiance to the United States, but remained a loyal citizen; that all of the deeds aforesaid are void; that they conveyed no title as against the plaintiff, but are a cloud upon his title. This paragraph prays that plaintiff's title may be quieted, and for all proper relief.

To this complaint Bailey Davis was made a co-defendant on his own petition, which alleged that he was bound to the defendant Henry by covenants of warranty.

The defendants demurred separately to each paragraph of the complaint for want of facts sufficient. These demurrers were overruled. The defendants separately answered the complaint by general denial, and the defendant Henry filed a cross complaint against the plaintiff, claiming to be the owner of the land, and praying that his title be quieted against the plaintiff's claim. The plaintiff answered the cross complaint by a general denial.

The issues were tried by the court, who found for the plaintiff upon the complaint and upon the cross complaint, with \$360 damages against the defendant Henry, and that said deed to the Morelands was never delivered, and that it and all the subsequent deeds aforesaid were a cloud upon the plaintiff's title, which ought to be removed.

The defendants moved for a new trial, alleging thirteen reasons therefor. This motion was overruled. Judgment was rendered pursuant to the finding. The defendants appealed.

The errors assigned are overruling the demurrers to each paragraph of the complaint, and overruling the motion for a new trial.

The appellants admit in their brief that the first paragraph of the complaint was good, and we think the second paragraph was also good. The averments of that paragraph being admitted by the demurrer, the deed to the Morelands was

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never delivered, but was fraudulently obtained and put on record by some unknown person thirteen years after its date, the plaintiff knowing nothing about it until immediately before suit brought; it was, therefore, no better than a forged deed recorded under the same circumstances, the party defrauded being ignorant of the forgery until immediately before his suit brought for relief. There was no error in overruling the demurrers to the several paragraphs of the complaint.

The first four causes for a new trial are, substantially, that the finding is not sustained by the evidence and is contrary to law. •

The evidence is in some respects conflicting, but it appeared clearly that the appellee was the owner of the land in controversy, and that the defendant claimed it under certain deeds as alleged in the complaint, and that the plaintiff, in 1860, was living in Tennessee and moved thence to Arkansas, in May, 1861, where he has lived ever since; that the plaintiff, by his brother and attorney in fact, who lived in Ohio, had given the Morelands a bond for a deed, reciting a sale of the land by the appellee to the Morelands for \$3,500, payable, \$100 in advance, \$900 on December 25th, 1860, \$1,000 on December 25th, 1861, \$750 on December 25th, 1862, and \$750 on December 25th, 1863, with interest after December 25th, 1860, which payments were secured by notes of the Morelands; that the bond was conditioned for the execution of a deed to the Morelands on payment of the purchase-money as above, and that after the payment of the \$900 due December 25th, 1860, the Morelands should have possession of the land.

There was evidence tending to show that the Morelands were unable to make the payment of \$900 on December 25th, 1860, and were then notified that they could not expect possession of the land until they complied with their contract in that respect; that the appellee then left the notes and deed with his attorneys, with instructions to carry out the contract

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and deliver the deed to the Morelands if the payment should be made; that nothing was ever paid to the appellee for the land except said advance payment of \$100, and that he never gave authority to anybody to deliver the deed, except the above conditional authority, to his attorneys, and never gave the Morelands authority to take possession of the land, and never knew they had so taken possession, until the day before the trial of this suit; that the appellee, after the failure of the Morelands to pay the \$900 due December 25th, 1860, returned to Tennessee; that in May, 1861, he removed to northeastern Arkansas, where he has lived ever since; that appellee was never able to come to Indiana to look after the land; that he wrote to several attorneys of Indianapolis, who declined to act without money; that he wrote to his own attorneys but received no information from them; that the appellee received by mail a notice of proceedings in the United States District Court at Indianapolis, for the confiscation of said notes, which notice required him to appear on February 1st, 1864, but was not received by him until several months after that date, and that he never made any further inquiry about the land, "because he thought that Uncle Sam had got hold of it;" that it was confiscated by the United States, and he never knew it was not confiscated until about two months before the trial of this suit.

It appeared by a transcript of said confiscation proceedings, that the property attempted to be confiscated was a judgment in the Madison Circuit Court in favor of the appellee against said Morelands, at April term, 1861, for \$917.60, with a credit thereon of \$500, and two notes against the same parties, one due December 25th, 1862, and the other due December 25th, 1863, and that the alleged cause of confiscation was, that the appellee had been engaged in aiding and abetting the Rebellion. The transcript showed that the information was filed January 17th, 1863, and that afterwards a monition was issued requiring the marshal to attach the property and detain it until the further order of the court, and to give notice, etc.,

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and that said monition was returned on January 20th, 1863, with a return of the marshal showing a seizure of the property. The transcript showed that the affidavit, on which the information was founded, was made by the said Moses Moreland, on January 14th, 1868, who swore that the appellee was in open rebellion, but there was evidence tending to show that this affidavit was false, and that the appellee was all the time loyal to the United States.

The transcript further showed that the amount of the indebtedness confiscated was \$3,550, which was ordered to be sold, and was sold to James Smith for \$202, which was applied as follows: For marshal's costs \$51.36; for clerk's costs \$54; for docket fee \$20; and that the remainder was applied in other cases against another party, and that a certificate of purchase was issued to the said James Smith, who was engaged in the clerk's office of said district court.

There was also evidence tending to show that the Morelands took possession of the land in the spring of 1861, and held it until 1864; that they had the bond in their possession until 1864, and that it was then given to other parties; that in July, 1863, one of the attorneys of the appellee, with whom the deed and notes had been left by the appellee, was served with a *subpœna duces tecum*, requiring him to produce the same in said district court; that in obedience to said subpœna he took the deed and notes to the court, and was directed by the then judge of said court to deliver them to deputy marshal Bigelow, as the safest person with whom they could be left; that he left them with said Bigelow to be used in court, if necessary; that he tried to get them afterwards from said Bigelow, but never got them; that said attorneys appeared for Carson in said confiscation proceedings, and filed an answer for him, which was stricken out for want of an affidavit; that they never gave notice of the confiscation proceedings to the appellee, because they concluded they could not reach him with a notice.

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It appeared that the confiscated indebtedness was ordered to be sold at the court-house in Anderson, and there was evidence tending to show that on the day of sale the Morelands went to Anderson intending to have a friend to buy in the notes for them, but although they were there from 9 o'clock A. M. until 3 o'clock P. M. of the day of sale, they could not find the parties making the sale until after the sale had been made.

It further appeared that in February, 1864, the Morelands sold their interest in the land to Alanson E. Russell, who was to take the land and pay the Morelands \$1,000, and assume their obligations, and that at Russell's request the Morelands made a deed for the land to Benjamin F. Alexander, who took possession of the land in the spring of 1864, and that Russell at that time had never seen any bond or deed from the appellee to the Morelands, and Russell testified that the bond was never assigned to him. It appeared that the bond was finally found at Indianapolis, in the clerk's office of the district court, about two months before the trial of the present suit, and the notes were also there. It appeared that said Russell and Joseph O. Hardy bought the land afterwards from said Alexander, and had possession of it, and then Hardy bought out Russell and took possession of the land in 1866, and sold it to Bailey Davis in 1880, who sold it to the defendant Henry in 1881.

It also appeared that in February, 1865, said Joseph O. Hardy went to Indianapolis and there procured from said deputy marshal Bigelow the deed from Carson to the Morelands, which had been left with him for safe-keeping, to be used in court, if necessary, in the confiscation proceedings, and that said Hardy kept said deed in his safe and did not put it on record until 1873, and that the deed from the Morelands to Alexander, although dated in January, 1865, was not put on record until September, 1871; that the deed from Alexander to Hardy and Russell, although dated in March, 1865, was not put on record until May, 1876; that

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the deed from Russell to Hardy, although dated in April, 1866, was not put on record until February, 1868, and that the deeds from Hardy to Davis, and from Davis to Henry, were recorded in proper time. The evidence showed that no formal demand of possession was made upon the defendant Henry, although he was informed by the appellee's attorney that he was about to commence suit for the appellee to recover the land. There was evidence tending to show that although the deed and notes were left with the appellee's attorneys for a specific purpose, and not for suit, yet some of them were put in suit, and money was collected on one of them by execution, but that this was without the knowledge of the appellee, and that no part of said money ever came to his hands. The appellants claim that the evidence shows they were innocent purchasers for value, not chargeable with fraud; that the deed from Carson to the Morelands was improperly delivered, because of the carelessness and negligence of the appellee's agent, and that the long silence of the appellee from 1865 until 1882 will estop him from asserting any claim to the land.

They claim, secondly, that the confiscation proceedings were regular, and that after the confiscation the appellee had no interest either in the purchase-money or the land; that his title to the indebtedness was divested, and thenceforward he had no further interest in the land; that it makes no difference whether the appellee was loyal or not, nor whether he had or had not notice of the confiscation proceedings.

They claim, thirdly, that there has never been any rescission of the contract; that the appellee, on the default of the Morelands, elected to maintain suits for the purchase-money, thereby affirming the contract, and depriving himself of the right to complain of Moreland's possession of the land, and that, even if not so estopped, he could not recover the land without a formal notice of rescission and a demand of possession.

But the evidence tends to show that the Morelands were

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wrong-doers from the beginning; they were not vendees put in possession by the vendor, and they had not the rights of such vendees; they were not to have possession until they paid the \$900; they refused to pay it; they took possession wrongfully without paying it, and they thereby gained no rights which would entitle them to a demand of possession before suit brought. *Kratemayer v. Brink*, 17 Ind. 509. The appellants' third ground of objection to the plaintiff's recovery is applicable only to cases where the vendee is lawfully in possession under the contract. The Morelands not only went into possession without authority, but they promoted the confiscation proceedings founded on the false affidavit of one of them, and the fair inference from the testimony is that their object was to buy in the indebtedness, and were only prevented therefrom by the proceedings of the court subordinates, which enabled Smith, one of their number, to become the purchaser at \$202. We think the evidence tends to show an abandonment of the contract, equivalent to a rescission of it. *Fowler v. Johnson*, 19 Ind. 207; *Shirley v. Shirley*, 7 Blackf. 452.

It is not true that the deed from Carson to the Morelands was improperly delivered by the negligence of the appellee's agents; it was never delivered to the Morelands at all. When the plaintiff's agent, in obedience to a *subpœna duces tecum*, brought said deed to the U. S. District Court, and was directed by the judge of said court to leave it with the deputy marshal, to be used if necessary as evidence in the pending suit, there was no negligence in the agent in obeying that direction, nor in afterwards unsuccessfully demanding from the deputy the return of the deed.

The deputy's wrongful acts in refusing to return the deed to the appellee's agent, and in delivering it to Hardy without authority from the appellee, and the fact that Hardy, in his attempt to secure the land for himself, took said deed and put it in his safe and kept it there eight years without recording it, do not show any negligence in the appellee, and can

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not affect his title, and the long silence of the appellee, from 1865 to 1882, he being a non-resident and ignorant of all the aforesaid contrivances, can not, under the circumstances detailed in the evidence, injuriously affect his rights. He commenced this suit within two or three months after he became acquainted with the facts. The questions as to the regularity and the effect of the confiscation proceedings will be considered hereafter.

The appellee proved his title; he made a deed to the Morelands to be delivered to them upon condition; the condition was never fulfilled. The Morelands took possession of the land wrongfully; their bond for a deed as well as the unexecuted deed of Carson to them, and also the evidences of their indebtedness to Carson, were all in the possession of the deputy marshal and others at the clerk's office of the United States District Court. The deed was never delivered to the Morelands; it was procured by Hardy from the deputy marshal, kept in his safe from 1865 to 1873, and was then recorded.

In the meantime the Morelands had made a deed to Alexander in January, 1865, which was recorded in 1871. Alexander had made a deed to Hardy and Russell in March, 1865, recorded in 1876. Russell had made a deed to Hardy in 1866, recorded in 1868, and all of these conveyances, except the last one, were made and received before Hardy got possession of the deed from the appellee to the Morelands, and they were all made without any delivery of that deed to the Morelands, and without anything on record in the recorder's office indicating that the appellee's title therein shown had been parted with. It can not be pretended that any of these conveyances deprived the appellee of his title. Hardy knew all the time that there had been no delivery by the appellee to the Morelands of his deed to them, but finally, in 1873, he put that deed on record, and in 1880 conveyed the land to Davis, who, in 1881, conveyed it to Henry. There was evidence tending to show that Henry and Davis were

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purchasers for value, but the facts in relation to the non-recording of the previous deed were apparent on the records, and, even without such facts, their title would seem to be no better than if the deed to the Morelands had been forged and put on record.

If a grantee gets possession of the deed surreptitiously on any other terms than by fulfilling the condition, there has been no delivery with the assent of the grantor, and the title could not be conveyed. *Harkreader v. Clayton*, 31 Am. R. 369.

A deed, delivered without the knowledge, consent or acquiescence of the grantor, is no more effectual to pass title to the grantee than if it were a total forgery, although the instrument may be spread upon the record, and innocent purchasers are not protected. *John v. Hatfield*, 84 Ind. 75; Pom. Eq. Jur. 735, 779, 807, 821; Bigelow Fraud, 156; *Austin v. Dean*, 40 Mich. 386; *Ramsey v. Riley*, 13 Ohio, 157; *Van Amringe v. Morton*, 4 Whart. 382. These cases show that even if the appellants purchased in good faith for a valuable consideration and without notice, such facts will not avail against the appellee, his equities are at least equal to those of the appellants, and in equal equities the legal title prevails.

As to the confiscation proceedings, it may be observed that the United States had no authority, under the Constitution, to confiscate the land of the appellee, even if he had been a traitor, for any longer period than during his life; and it may be observed further that in this case the land was not confiscated; the indebtedness only was confiscated. The suggestion of the appellants that when the indebtedness was confiscated, the appellee thereby lost his land, can not be sustained. But it is not necessary here to determine what would be the effect of regular proceedings in confiscation, because the confiscation proceedings in this case were clearly irregular, and were of no validity even against the indebtedness.

These were proceedings to take private property for public use, without compensation, and, therefore, on general principles, must be strictly construed. The United States District

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Court is a court of limited jurisdiction; its jurisdiction, therefore, must appear on the face of the proceedings. *Galpin v. Page*, 18 Wall. 350; *McCarty v. State*, 16 Ind. 310; *Justice v. State*, 17 Ind. 56; *Cobb v. State*, 27 Ind. 133. And when it has acquired jurisdiction its powers must be strictly pursued.

The power to confiscate the property of rebels in the loyal States arises upon the act of July 17th, 1862, 12 U. S. Statutes at Large, 589.

The doctrine that when a court has once acquired jurisdiction, it has a right to decide every question which arises in the cause, and that its judgment, however erroneous, can not be collaterally assailed, "is only correct when the court proceeds, after acquiring jurisdiction of the cause, according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it." *Windsor v. McVeigh*, 93 U. S. 274. The same rule has been otherwise expressed as follows: "Jurisdiction having attached in the original case, everything done within the power of that jurisdiction, when collaterally questioned, is to be held conclusive of the rights of the parties, unless impeached for fraud." *Cornett v. Williams*, 20 Wall. 226.

Therefore, even if the district court of the United States had acquired jurisdiction in the case under consideration, its record shows upon its face that its judgment was unauthorized by law. It shows that, after notice by publication, the appellee appeared by his attorneys and filed an answer, and that his appearance and answer were stricken out, and judgment was rendered against him by default. The pretext for this was that there was no affidavit of the appellee's loyalty. The effect of the ruling was that although an alleged traitor, when prosecuted, was entitled to a notice requiring him to appear, yet if he should appear he could not be heard in defence. In *McVeigh v. U. S.*, 11 Wall. 259, the proceedings were similar. There the defendant's answer was stricken from

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the files, and he was defaulted because he was a resident of Richmond, within the Confederate lines, and was a rebel. The Supreme Court, on a writ of error, reversed the judgment below, and Mr. Justice SWAYNE, delivering the opinion of the court, said: "The district court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there, he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and civilization. We can not hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice." This was on error. The same question came up when the same judgment was collaterally attacked in an action of ejectment, in the case of *Windsor v. Mc Veigh*, 93 U. S. 274. Mr. Justice FIELD, delivering the opinion of the court, said: "It was not within the power of the jurisdiction of the district court to proceed with the case, so as to affect the rights of the owner after his appearance had been stricken out. * * For jurisdiction is the right to hear and determine; not to determine without hearing. And where, as in that case, no appearance was allowed, there could be no hearing or opportunity of being heard, and, therefore, could be no exercise of jurisdiction. By the act of the court, the respondent was excluded from its jurisdiction."

The foregoing cases show that the aforesaid confiscation proceedings were of no avail against the appellee, even if jurisdiction had originally been properly obtained.

The appellee insists that jurisdiction was never obtained by the district court, because the record fails to show any seizure of the property under executive order before the filing of the information. This point seems to be well made. In *United*

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States v. Winchester, 99 U. S. 372, the court said: "But upon another ground, apparent upon the face of the record, the proceedings and decree of the district court can not be sustained. There was no previous seizure of the property under any order of the executive; and such seizure was an essential preliminary to give jurisdiction to the court to adjudge its forfeiture and decree its condemnation. The executive seizure is the foundation of all subsequent proceedings under the confiscation act. Such is the plain import of the law, and it was so held by this court in *Pelham v. Rose*, 9 Wall. 103, and reaffirmed in *The Confiscation Cases*, 20 *id.* 92."

In the case last cited from 20 Wallace, it was held that where the information avers that on a day named a seizure was made by the marshal under the proper executive authority, and where, after a monition founded on such information, default has been made, it will be presumed, after final judgment and condemnation, that the requirements of the confiscation act, which direct that a seizure be made prior to filing the information, and that this seizure be by order of the President of the United States, have been complied with. But the information under consideration in the case at bar, contains no such averments and fails to show any such seizure, nor is any such seizure shown in any part of the record of the confiscation proceedings.

We have now disposed of the first four reasons for a new trial. The fifth, sixth, seventh, eighth and ninth reasons for a new trial are waived, not being discussed in the appellants' brief. The tenth, eleventh, twelfth and thirteenth reasons for a new trial, present as errors the action of the court in permitting the appellee to answer questions in reference to his loyalty to the United States during the war of the Rebellion.

The bill of exceptions shows that the objection to each of these questions was that "it is not competent for the witness to contradict the record of the district court of the United States, the record having been introduced by the plaintiff, and because the questions are irrelevant and immaterial."

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The appellee was seeking to show a fraudulent combination to deprive him of his property by colorable confiscation proceedings which were in fact absolutely void, and although it be conceded that he failed to make the fraud fully appear, the matter objected to was admissible as part of the testimony tending in that direction. In a certain sense the testimony was immaterial and irrelevant, because the loyalty or disloyalty of the plaintiff could not affect his title to the land, but, regarded as irrelevant and immaterial, the admission of it was a harmless error which could have no effect on the result of the suit, and will not warrant a reversal of the judgment *Wayne County Turnpike Co. v. Berry*, 5 Ind. 286; *McDermitt v. Hubanks*, 25 Ind. 232.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Feb. 13, 1884. Petition for a rehearing overruled June 25, 1884.

 No. 10,565.

HEGE ET AL. v. NEWSOM.

PRACTICE.—*Trial without Reply.*—Where the parties to an action, in which there is an affirmative answer, go to trial without a reply and without any objection because of the want of a reply, the cause will be treated on appeal as if a reply in denial had been filed.

SAME.—*Demurrer.*—*Harmless Error.*—There is no available error in the sustaining of a demurrer to a good paragraph of answer, where there remains another paragraph substantially the same.

SAME.—*Assignment of Error.*—*Instructions.*—*Motion for New Trial.*—A refusal of the court to consider or take any action upon instructions offered by a party, if error, would be ground for a new trial, and could not, on appeal, be specially assigned as error.

SAME.—*Time for Submitting Instructions.*—A party, who desires special instructions to be given to the jury, must deliver them to the court before the argument to the jury commences, and is not entitled to have any consideration given to his instructions offered later.

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SAME.—Evidence.—Sustaining Objection to Question.—Offer of Proof.—To render available as error the sustaining of an objection to a question propounded to a witness, the record should show that the party asking the question stated to the court what fact or facts he expected to prove.

SALE.—Warranty.—Measure of Damages.—The measure of damages for a breach of warranty as to the quality of a chattel sold is the difference between the actual value at the time of sale and the value which the article would have had if it had been as warranted.

SAME.—Return of Article Warranted.—The buyer, in such case, need not return or offer to return the article, in order to sustain an action for the breach of warranty, or to set it up as a defence or as a counter-claim in an action for the price.

SAME.—Proof of Value.—The price paid or contracted for by the buyer is *prima facie* the value of such an article as would have complied with the warranty.

SAME.—Burden of Proof.—To reduce the contract price of goods sold, and kept and used by the buyer, under his claim of a breach of warranty of their quality, the burden is upon him to show how much less than that price the goods were worth.

SAME.—Examination by Buyer.—The owner of certain standing trees pointed out a certain number thereof to another who had full opportunity to examine them, and did examine them, and then agreed with said owner to pay him for the particular trees examined, on the basis of the number of feet which the logs from such trees would make, at a certain price per hundred feet, and nothing was said in reference to the quality of lumber, they might produce. The owner thereupon cut down and delivered the trees in logs.

Held, that there was no warranty of the quality of such logs.

From the Bartholomew Circuit Court.

J. C. Orr, S. Stansifer and W. D. Stansifer, for appellants.
N. R. Keyes, for appellee.

BLACK, C.—The appellee sued the appellants, the complaint containing three paragraphs. The first was upon an account for saw-logs sold and delivered, for hauling the same, for sawing done, and for produce sold and delivered. The second paragraph alleged a contract between the appellee and the appellants for the sale by the former to the latter of 14,398 feet of logs at and for the price of sixty-five cents per hundred feet, and for the hauling of the same by the appellee at and for the price of fifteen cents per hundred feet, and

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for the sawing of 1,580 inches of logs by the appellee at and for the price of three-fourths of a cent per inch ; and alleged performance by the appellee and acceptance by the appellants, and their failure and refusal to pay. The third paragraph alleged the sale by the appellee to the appellants of 14,398 feet of logs, and the receipt of the same by the latter at and for the agreed price of eighty cents per hundred feet, and the failure of the appellants to pay.

The appellants demurred to the first and second paragraphs of the complaint ; the demurrers were overruled, and these rulings have been assigned as errors ; but the appellants have waived the errors, if any, by failing to discuss the rulings in their brief.

The appellants answered in four paragraphs, the first of which was a general denial ; the second was an answer of set-off ; the third, pleaded by way of partial defence, set up the unmerchantable character of part of said saw-logs ; the fourth paragraph set up the unmerchantable character of a portion of the logs as a counter-claim.

The appellee demurred to the second, third and fourth paragraphs of the answer. The demurrer to the second paragraph was overruled, those to the third and fourth paragraphs were sustained. The rulings upon the demurrers to the third and fourth paragraphs have been assigned as errors.

The appellants filed two additional paragraphs of answer, numbered fifth and sixth, demurrers to which were overruled. The record does not show that a reply was filed, but the parties, without any objection because of the want of a reply, went to trial ; and therefore the cause is to be regarded as if there had been a reply in denial to the second, fifth and sixth paragraphs of answer. Counsel for both parties say in their briefs, that the fifth paragraph was substantially the same as the third paragraph, and that the sixth was substantially the same as the fourth. If, then, there was any error in sustaining the demurrers to the third and fourth para-

graphs, the appellants were not harmed thereby, and we need not inquire as to the sufficiency of those paragraphs.

There was a verdict for the appellee for \$112.50. A motion for a new trial made by the appellants was overruled, and judgment was rendered on the verdict.

After the close of the evidence and during the progress of the argument to the jury, counsel for the appellants tendered to the court, and requested it to give to the jury, two special instructions in writing, properly numbered and signed by counsel for the defendants as such. The court, on the ground that these instructions were not presented in time, refused to consider them and refused to endorse thereon, "Refused and excepted to by defendants at the time," or "given," or "given as modified."

This action of the court, shown by bill of exceptions, has been assigned as error. It was also made a cause in the motion for a new trial. If it was erroneous, it was ground for a new trial, and could not here be specially assigned as error. But there was no error in the court's refusal. The statute requires that a party who desires special instructions to be given to the jury shall deliver them to the court before the argument to the jury commences; and he is not entitled to have any consideration given to such instructions tendered to the court after the commencement of the argument to the jury. R. S. 1881, sections 533, 534; *Ollam v. Shaw*, 27 Ind. 388; *Malady v. McEnary*, 30 Ind. 273.

On the trial, the appellants asked a witness testifying in their behalf to state "what, if anything, you told John Ritz while he was delivering these logs about any of the logs not being worth anything, or about not receiving them on account of their not being fit to make lumber of." The appellee objected to this question, and the court sustained the objection.

We can not say that this ruling was erroneous, for the reason, if for no other, that the appellants did not state to the court what fact or facts they expected to prove.

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This has been decided so often that no citation of authority can be needed.

The appellants excepted to each of the instructions given to the jury. We will consider those which have been noticed by counsel in argument.

The eighth instruction was as follows: "But if you find that the contract between the parties was that the plaintiff was to receive the sum of eighty cents per hundred feet for logs delivered by him, *and that this covered the timber, cutting and drawing*, then the measure of the plaintiff's recovery will be determined by multiplying the number of hundred feet delivered for which the defendants would be liable by eighty cents, and this product would be his damages on this branch of the question, and no more."

The evidence showed that in the negotiation for the purchase of the logs different propositions were made on the part of the appellants to the appellee, one for the purchase of the logs at sixty-five cents per hundred feet, the timber to be cut and hauled by the appellants; another for the purchase of the timber at sixty-five cents, to be cut by the appellee at three-fourths of a cent per inch; another for the purchase at eighty cents per hundred feet for the logs delivered at the mill. It was necessary for the jury to determine which of these propositions was accepted, and it was not improper for the court to instruct the jury how to arrive at the damages upon the basis of the proposition to pay eighty cents per hundred feet, if they should find that this proposition was accepted. The objection made to the instruction by the appellants relates to the words in italics, and they contend that the court, in effect, said that if the contract to deliver at eighty cents per hundred feet did not expressly include expense of cutting and drawing, the plaintiff could recover in addition to the eighty cents per hundred his expenses for cutting and drawing the timber to the place of delivery. The instruction was plainly incapable of such a construction, and, in view of the evidence, the words in italics were not improperly used.

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Objection is made to the thirteenth instruction. In the immediately preceding instructions the court had stated that a contract of the character described in said preceding instructions would bind the defendants to pay the stipulated price for such logs only as would make merchantable lumber, and for the number of feet of merchantable lumber they would make. In the thirteenth instruction the court told the jury that under such a contract "all the logs that were taken by the defendants and the lumber used by them will be regarded and held by you to have been merchantable lumber, and the defendants will be held to pay for all such so appropriated by them, at the contract price."

There was evidence that a portion of the lumber, about two thousand feet, made by the appellants from the logs, was not merchantable, and was not fit for lumber, and that it was cut up by the appellants and used as fuel by them in their mill.

It is well settled that the measure of damages for a breach of warranty as to the quality of a chattel sold is the difference between the actual value of the article at the time of sale and the value it would have had if it had been as warranted, and that the buyer need not return or offer to return the article in order to sustain an action for the breach of warranty, or to set it up as a defence or as a counter-claim in an action for the recovery of the price. *Overbay v. Lighty*, 27 Ind. 27; *Street v. Chapman*, 29 Ind. 142; *Booher v. Goldsborough*, 44 Ind. 490; *Love v. Oldham*, 22 Ind. 51; *Ferguson v. Hosier*, 58 Ind. 438.

The price paid or contracted for by the buyer is *prima facie* the value of such an article as would have complied with the warranty. *Overbay v. Lighty, supra*; *Street v. Chapman, supra*.

In view of the evidence as to the unmerchantable lumber appropriated and used by the appellants, it is insisted on their behalf that the thirteenth instruction, which directed the jury to regard all the lumber used by the appellants as merchantable lumber, and charged the jury to hold the appellants to pay for all the lumber appropriated by them at the con-

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tract price, was misleading. But upon examination of the record we do not find that there was any evidence as to the actual value of this portion of the lumber or of the logs from which it was manufactured. To reduce the contract price, the burden was upon the appellants to show how much less than that price the lumber appropriated and used by them was worth. Without such evidence there was no error in the thirteenth instruction.

Objection is also made to the nineteenth instruction. In it the jury were told that if the evidence showed that the plaintiff pointed out to the agent of the defendants a certain number of trees, and the agent had full and ample opportunities to examine them, and did examine them, and then promised and agreed with the plaintiff to pay him for these particular trees on a basis of the number of feet which the logs from such trees would make, at a specified and stipulated price per hundred feet, and nothing was said in reference to the quality of lumber they might produce, and that the plaintiff accepted this proposition and cut down and delivered the trees in logs, the defendants would be liable to pay to the plaintiff the price agreed upon for each hundred feet of logs so cut and delivered from these trees, irrespective of their quality.

There was evidence to which this instruction was pertinent, and we think that the facts therein supposed did not import a warranty.

It is claimed that the amount of the recovery was too large. This claim is based upon what is said to be a preponderance of the evidence. We can not weigh conflicting testimony.

The judgment should be affirmed.

PER CURIAM.—Upon the foregoing opinion, the judgment is affirmed, at the costs of the appellants.

Filed June 25, 1884.

 Nichols v. Nichols et al.

No. 11,176.

NICHOLS v. NICHOLS ET AL.

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JUDGMENT.—*Default.*—*Complaint for Relief Against.*—A complaint to set aside a judgment by default, which fails to show a specific defence to the action, is bad.

SAME.—*Summons.*—*Sheriff's Return.*—A sheriff's return, showing service of the summons, can not be questioned in a suit to set aside a default.

DEMURRER.—*Practice.*—A joint demurrer to several paragraphs of an answer must be overruled if one of the paragraphs is good.

From the Montgomery Circuit Court.

J. Wright, J. M. Sellers, P. S. Kennedy, W. T. Brush and T. S. Rollins, for appellant.

G. W. Paul and J. E. Humphries, for appellees.

FRANKLIN, C.—Appellant, on the 5th day of September, 1881, filed an amended complaint to set aside a default and judgment taken and rendered against him on the — day of September, 1879, the original complaint herein having been filed August 25th, 1881.

The defendants answered in five paragraphs. A demurrer was sustained to the second, and overruled to the third, fourth and fifth paragraphs, the first being a denial.

A reply was filed in two paragraphs, the first being a denial. There was a trial by the court, finding for defendants, and, over a motion for a new trial, judgment was rendered for the defendants.

The only error assigned and insisted upon is the overruling of the demurrer to the third, fourth and fifth paragraphs of the answer.

We first examine as to the sufficiency of the complaint, for the reason that a bad answer is good enough for a bad complaint, and if the complaint is bad, and a demurrer has been overruled to the answer, it makes no difference whether the answer is good or bad.

The complaint alleges, in substance, the commencement of
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the original suit, then sets out a copy of the complaint therein, with an accompanying exhibit of a trust deed to one Wilson in part for the use of the defendants herein and plaintiffs therein, executed by this plaintiff and wife. It then avers that the summons therein "was regularly issued in said case to the sheriff of Marion county for the then defendant George D. Nichols, and was afterwards returned endorsed as follows, as to said Nichols: 'Served by reading and delivering a copy of this writ to George D. Nichols, August 14th, 1879. JOHN T. PRESSLEY, Sheriff of Marion County.'"

It then alleges the default and judgment on the — day of September following. It then avers that the judgment was rendered without any notice to him; that no summons in said case had been served upon him, and that he had no knowledge of said proceedings and judgment for more than one year after said judgment was rendered; that the summons had been served upon another man of the name of George D. Nicholas, but not upon this plaintiff; that he has a "good and meritorious defence to a large part of the claim sued for in said complaint, in this, to wit, that he did not and does not owe said plaintiffs any sum whatever, except about \$1,200; that the judgment is wrongful and without any foundation." Making William Dunkle and Rebecca Dunkle defendants, alleging that they had purchased the land the title to which had been by said judgment decreed quieted in said plaintiffs therein. It contains no offer to pay the amount admitted to be due.

This plaintiff had been the guardian of the plaintiffs in the original suit, and in that suit they charged him with having invested a large amount of their money in lands in his own name, which he held in trust for them, and which they recovered and had their title quieted to in said suit, and recovered a judgment for \$2,000 for other moneys belonging to them, which he had converted to his own use.

The complaint to set aside the default and judgment fails to deny the use and investment of his wards' money in the pur-

chase of lands in his own name, and does not show any defence to that charge, if the default and judgment should be set aside.

A complaint to set aside a default and judgment, in order to be good, must specifically allege a defence; a general charge that the complaint, in relation to the land, "was wholly wrongful and without any foundation," is not sufficient. *Lake v. Jones*, 49 Ind. 297; *Bristor v. Galvin*, 62 Ind. 352; *Slagle v. Bodmer*, 75 Ind. 330; *Lee v. Basey*, 85 Ind. 543. But there is a more fatal objection urged to this complaint; it seeks to contradict the return of the sheriff upon the summons. This can not be done. The return of the sheriff of service upon the summons is conclusive against the defendant in the action.

This complaint shows that the summons in the original case was returned by the sheriff endorsed, "Served by reading and delivering a copy of this writ to George D. Nichols." And the plaintiff in this case can not be permitted now to successfully allege that the summons was not served upon him, but upon one "George D. Nicholas." If the sheriff made a false return appellant must look to him for indemnity, if he has been damaged thereby, and can not have the default and judgment set aside on that account. *Rowell v. Klein*, 44 Ind. 290 (15 Am. R. 235); *Splahn v. Gillespie*, 48 Ind. 397; *Johnson v. Patterson*, 59 Ind. 237; *Stockton v. Stockton*, 59 Ind. 574; *Hume v. Conduitt*, 76 Ind. 598; *Birch v. Frantz*, 77 Ind. 199; *Johnston, etc., Co. v. Bartley*, 81 Ind. 406; *Coan v. Clow*, 83 Ind. 417; *Krug v. Davis*, 85 Ind. 309.

Considering the return of the sheriff of service of process upon the appellant, in the original action, as conclusive against him, there is no sufficient reason shown why he did not appear and set up his defence in the original action. The complaint to set aside the default and judgment was insufficient, and there was no error in overruling the demurrer to the third, fourth and fifth paragraphs of the answer.

If this were not so, the demurrer was a joint demurrer to

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the second, third, four and fifth paragraphs of the answer, and the assignment of errors is a joint assignment upon the overruling of the demurrer to the third, fourth and fifth paragraphs of the answer. If any one of the paragraphs to which the demurrer was overruled is good, there was no error in overruling the demurrer.

The answer was filed by Dunkle and wife, and the fourth paragraph thereof substantially alleges the bringing of the original suit and the rendition of the judgment, embracing therein a copy of the judgment, which states, "It appearing from the writ issued in this cause, with the sheriff's return endorsed thereon, to wit (insert), that the same was served on the defendants, George D. and Sarah Nichols, more than ten days before the first day of the present term of this court, to wit, on the 21st day of August, 1879.

"That on the faith of said judgment, and believing that said decree and judgment were valid and binding, and without any knowledge of any defect in or want of service of summons on said George D. Nichols, they, in good faith, purchased said land in said decree described of the said James A. B. Nichols, Harriet J. Killen and Mary Nichols, widow of the said William H. Nichols, on the — day of March, 1881, and before the plaintiff had taken any steps to have the said default and judgment set aside, the complaint in this case not being filed until the 25th day of August, 1881, and had paid a large portion of the purchase-money, to wit, \$2,000, and had assumed the payment of the Dundee Trust and Investment Company's mortgage thereon for \$4,000, and since that time have been compelled to pay the same with \$694.94 interest thereon, which mortgage was executed by said George D. Nichols on said land, and is now fully paid off by these defendants, on the faith of the decree and judgment aforesaid, and the purchase and conveyance of said land aforesaid, and that they are in full possession of said land under said purchase, and were so in possession before the commencement of this suit."

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We think this paragraph of answer stated facts sufficient to bar the plaintiff from having said default and judgment set aside for the want of the service of process upon him, when the record shows there was such service. And without discussing the other paragraphs of answer to which the demurrer was overruled, we think there was no error in overruling the demurrer.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be in all things affirmed, with costs.

Filed June 25, 1884.

No. 9759.

HENDERSON v. THE STATE, EX REL. BALDWIN, ATTORNEY GENERAL.

AUDITOR OF STATE'S FEES.—*Public Officer.*—*Insurance Law of March 3d, 1877.*—*Duties of Auditor.*—*Statute Construed.*—Fees are compensation given by law to public officers for official services rendered to individuals. The insurance law of March 3d, 1877, imposed the discharge of new and additional duties upon the auditor of state in relation to foreign insurance companies doing business in this State, and authorized such auditor to charge and collect, for his services in the discharge of such duties, certain new and additional fees; and as the law did not provide for the application of such fees, when imposed and collected, in any different way or to any different purpose, they became and were the property of the auditor of state.

SAME.—*Act of March 24th, 1879.*—*Retroactive or Prospective Legislation.*—*Statutory Construction.*—It is a maxim of the law that statutes must be construed prospectively, unless their language plainly imports a different intention on the part of the Legislature. The act of March 24th, 1879 (section 5627, R. S. 1881), which requires the auditor of state to pay into the state treasury a specified percentage of all fees by him collected in the insurance and land departments of his office, is not retroactive in its terms, but was manifestly intended to be prospective in its effect and operation.

COSTS.—*Suit by State on Relation of State Officer.*—*Relator Chargeable with Costs.*—*Payment of Relator's Costs by State.*—Where suit is brought by the State, on the relation of the attorney general or other state officer,

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for the recovery of money or property claimed by the State, the relator is liable for costs, "and all costs taxed against such relator shall be paid by the State."

From the Johnson Circuit Court.

S. Claypool, W. A. Ketcham, G. W. Grubbs, D. D. Bantl, W. R. Harrison, W. E. McCord and J. Finch, for appellant.

J. H. Jordan, D. P. Baldwin, F. T. Hord, Attorney General, *A. C. Harris*, and *W. H. Calkins*, for appellee.

Howk, C. J.—The appellant, Ebenezer Henderson, was the auditor of state for this State for two full terms of two years each, beginning on the 26th day of January, 1875, and ending with the 25th day of January, 1879. During his second term of office, to wit, on the third day of March, 1877, the General Assembly passed an act entitled "An act to amend section one of an act entitled 'An act regulating foreign insurance companies doing business in this State, prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and prescribing penalties for the violation of the provisions of this act,' approved December 21st, 1865, and adding supplemental sections thereto." By reason of an emergency declared in the body of the law, this act was in force from and after its passage. Section 3 of this act, being section 3773, R. S. 1881, reads as follows:

"When, by the laws of any other State, any taxes, fines, penalties, licenses, fees, deposits of money or securities, or other obligations or prohibitions are imposed upon insurance companies of this or other States, or their agents, greater than are required by the laws of this State, then the same obligations and prohibitions, of whatever kind, shall, in like manner for like purposes, be imposed upon all insurance companies of such States and their agents. All insurance companies of other Nations, under this section, shall be held as of the State where they have elected to make their deposit and establish their principal agency in the United States."

After this section became in force, on March 3d, 1877, un-

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der and by force of its provisions, the appellant, Henderson, as auditor of state, imposed and collected upon and from insurance companies of other states, or their agents in this State, fees "greater than are required by the laws of this State," the excess thus imposed and collected amounting in the aggregate to the sum of \$14,412. The question for decision in this case, and the only question, is this: To whom did the fees thus collected belong? The appellant's counsel insist, that the fees imposed and collected by the appellant, under the provisions of section 3773 above quoted, were a part of the emoluments of his office, and that he collected and retained them, because the law gave them to him in part compensation for his services as auditor of state. On behalf of the State, it is urged by the attorney general and his associate counsel, that the fees in question were collected by the appellant for the State, because the law required him to collect them for the State, and did not give them to him as emoluments of his office.

In considering the question presented for decision, it will be observed that section 3773, *supra*, is not an amendment of any prior law of this State. It is supplemental to the act of December 21st, 1865, regulating foreign insurance companies doing business in this State, and none of its provisions are to be found in any previous law. It is to be construed and interpreted, therefore, as if it were an original enactment, in connection with the other supplemental section. It may be well, however, before proceeding to the examination of the new legislation of March 3d, 1877, to notice briefly the prior statutes of this State in relation to foreign insurance companies.

The first statutory provisions of this State, concerning foreign insurance companies and their agents, were contained in section 56 of the act of June 17th, 1852, "for the incorporation of insurance companies, defining their powers, and prescribing their duties." 1 G. & H. 397. This section 56 was amended by an act approved March 2d, 1855. 1 G. & H. 398. Both the original and amended sections were declared,

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by this court, to be unconstitutional and void. *Igoe v. State*, 14 Ind. 239; *Grubbs v. State*, 24 Ind. 295. The case last cited was decided at the May term, 1865, of this court.

On December 21st, 1865, an original act was approved, entitled "An act, regulating foreign insurance companies, doing business in this State; prescribing the duties of the agents thereof, and of the auditor of state in connection therewith, and providing penalties for the violation of provisions of this act." This act may be said to be the first valid legislation of this State regulating foreign insurance companies as such; and, except as amended, it is still the law. In section 3 of this act it was originally provided as follows: "The auditor of state shall be entitled to five dollars in each case, for the examination of the statement, and investigation of the evidences of investment, and two dollars for each certificate of authority, issued under the provisions of this act, to be paid by the agent or agents applying for the same." Acts 1865, Spec. Sess., p. 107.

This section 3 remained in force until August 24th, 1875, when, by an act approved March 12th, 1875, it was amended so as to provide that "The auditor of state shall charge and collect, for the State of Indiana," the same fees mentioned in the original section; that on certain named days in each year he shall "make to the treasurer of state a sworn statement of," *inter alia*, "the entire receipts therefor since his last report; and shall pay over to the treasurer, to go into the general fund of the State, the entire amount of such receipts, less twenty-five per cent. thereon, which he may retain for his services in collecting the same." This amended section 3 is still in force, being section 3767, R. S. 1881.

The next legislation of this State, concerning foreign insurance companies, is the act of March 3d, 1877, first referred to in this opinion. We have said that the two supplemental sections of this act were not amendatory, but original legislation. By the first of these sections, being section 2 of the act and section 3772, R. S. 1881, new duties were imposed and new powers conferred upon the auditor of state in rela-

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tion to foreign insurance companies doing business in this State. So, also, in section 3773, above quoted, new and important duties are imposed upon the auditor of state in regulating the business of foreign insurance companies and their agents in this State. In section 3772 it is provided: "*Fifth.* The expense of all examinations, entries, and publications, as in this section provided, shall be paid by the company." But, for the payment of all other expenses incident to the proper discharge of his new duties, and for a compensation for his services in the premises, the auditor of state could look alone to the new and additional fees, which, under section 3773, he was authorized to impose upon, and collect from, the insurance companies of certain States, and their agents.

This brings us to the consideration of the question already stated in this opinion. To whom, under the law, did the new and additional fees belong, which were imposed and collected by the appellant during his second term of office? The word fee, as incident to an office, means a reward or compensation paid to the holder of an office, which he is entitled by law to impose and collect for an official service. Fees are compensation given by law to public officers for official services rendered to individuals. *Musser v. Good*, 11 Serg. & R. 247; *Tillman v. Wood*, 58 Ala. 578. See, also, *Wallace v. Board, etc.*, 37 Ind. 383; *Fulk v. Board, etc.*, 46 Ind. 150:

Whenever the General Assembly authorizes by new legislation the imposition and collection by a public officer of new and additional fees for the discharge of new and additional duties, we are of opinion that such fees, *ex vi termini*, when imposed and collected, belong to and are the property of such public officer, *unless* the law-making power has clearly indicated, in such legislation, that such fees shall be applied in a different way, or to a different purpose. That is, in such a case, no prior legislation would affect or control the appropriation of such fees by such public officer to his own use and purpose. In the case in hand, we do not doubt that the new and additional fees, imposed and collected by the appellant

as auditor of state, under the provisions of section 3773, and in controversy herein, belonged to him of right, and were his sole and separate property. We are strengthened and confirmed in this opinion by the action of the General Assembly in the passage of an act entitled, "An act prescribing certain duties of the auditor of state," approved March 24th, 1879. By virtue of an emergency declared, this act was in force from and after the date of its approval, which was about two months after the expiration of the appellant's second term of office as auditor of state. The act contains a single section, being section 5627, R. S. 1881, and reads as follows:

"It shall be the duty of the auditor of state to pay into the state treasury seventy-five per centum of all fees by him collected under the provisions of the third section of the act of March 3d, 1877 (section 3773), and of all other fees whatever collected by him, on account of services rendered in the insurance department and in the land department of his office. Said auditor of state shall be entitled to retain, for his services in collecting such fees, the sum of twenty-five per cent. thereon, and no more."

In the language of this act and of its title, there is a clear recognition by the Legislature of the fact that it was not the duty of the auditor of state, before the passage of such act, to account for and pay into the state treasury the whole or any part of the fees collected by him, under the provisions of section 3773, or in the land department of his office. In other words, the passage of such act was a virtual concession of the fact, on the part of the law-making power of the State, that, before that time, the auditor of state was entitled of right to all the fees imposed and collected by him under section 3773, and to all the fees collected by him in the land department of his office. Further than this, the act of March 24th, 1879, section 5627, above quoted, is not retroactive in its terms, but was manifestly intended to be prospective in its effect and operation. It is a maxim of the law that statutes must be construed prospectively, unless they plainly import a different

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intention on the part of the Legislature. *Pritchard v. Spencer*, 2 Ind. 486; *Hopkins v. Jones*, 22 Ind. 310; *Dale v. Frisbie*, 59 Ind. 530. We express no opinion in regard to section 5627, further than to say that it was not retroactive; we have referred to it in this opinion only for the purpose of argument.

Our conclusion is that the State has no valid or legal claim against the appellant, Ebenezer Henderson, for or on account of the whole or any part of the fees collected by him as auditor of state, under section 3773, *supra*, or of the fees collected by him, as such auditor, in the land department of his office. No other claim or demand is asserted against the appellant in either of the four paragraphs of appellee's complaint, or in the bill of particulars filed therewith in this action. The appellant's demurrers to each of the paragraphs of complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, were overruled by the court, and these rulings the appellant has assigned here as errors. For the reasons given we are of opinion that these errors are well assigned, and that the court ought to have sustained the appellant's demurrers to each and all of the paragraphs of appellee's complaint.

This conclusion renders it unnecessary for us to consider or decide any of the questions arising under the alleged error of the court in overruling the motion for a new trial.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrers to each paragraph of complaint, and for further proceedings not inconsistent with this opinion.

Filed Jan. 8, 1884.

ON PETITION FOR A REHEARING.

Howk, J.—On the 8th day of January, 1884, the judgment below in this cause was reversed by this court at the costs of the appellee's relator, the attorney general of the State at the time the suit was commenced. Since then, an earnest petition has been filed, by and on behalf of the at-

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torney general, wherein we are asked to set aside our judgment against him for costs. The point is made that "the State is not liable for costs, and when the State institutes an action, on the relation of the attorney general or other public officer, such officer is not liable for costs, unless the statute so expressly provides." It is doubtless true, as a general rule, that the State is not liable for costs, and especially so in criminal causes, which are prosecuted by and in the name of the State. "Costs are given or withheld by statute. *Smith v. State*, 5 Ind. 541, and *Dearinger v. Ridgeway*, 34 Ind. 54." *Schlicht v. State*, 56 Ind. 173.

Section 593, R. S. 1881, of the civil code, provides as follows: "Relators, and persons and corporations for whose use an action is brought, whether such use is shown by the pleadings of the plaintiff or defendant, shall be liable for costs jointly with the actual parties to the action; but when the State is plaintiff, the relator only shall be liable, and judgment for costs shall be rendered accordingly." Literally construed, and giving the words used "their plain, or ordinary and usual sense," as required by the *first* rule for the construction of statutes (section 240, R. S. 1881), there can be no doubt, we think, that the section quoted fully authorized and warranted our judgment against the relator for costs in this cause. It is said, however, by the attorney general that "this section of the statute applies to cases where the relator is the party in interest, and does not apply to a relator acting for and on behalf of the State." It is claimed that this court has decided that, in such cases, the relator is not liable for costs; and, in support of this claim, appellee's counsel cite the case of *State, ex rel., v. Board, etc.*, 85 Ind. 489. It can hardly be said that the opinion in that case affords very much, if any, support to the claim of the appellee in the case in hand. In the case cited, it is said: "The question of costs is one over which the courts in many cases have a discretion, and this being a case in which the State

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was practically the plaintiff, and one of its subordinate municipal corporations was defendant, involving questions concerning the custody and control of public funds, we do not feel at liberty to say that the court erred in refusing to render judgment against the relator for costs." This is all that was said by the court, in that case, upon the point now under consideration, and we do not regard it as decisive of the question.

If the ultimate payment of the costs taxed against the relator, in such a case as the one at bar, fell upon him personally out of his own private means, there would be much force in his claim, that he should not be held liable for such costs, notwithstanding the plain provisions of section 593 above quoted. It is provided, however, in section 5585, R. S. 1881, in force since May 6th, 1853, that "For breach of the condition of any official bond, by which the State is injured, the Governor shall direct suit to be brought, upon his own relation, unless otherwise provided by law; and all costs taxed against such relator shall be paid by the State." This section of the statute has never been expressly repealed, but its provisions are still in full force, except that all suits therein provided for, under the provisions of section 5668, R. S. 1881, in force since March 10th, 1873, must be brought upon the responsibility of the attorney general, and upon his relation. Liberally construing the provisions of section 5885 in connection with section 593, above quoted, as we think we ought to do, we reach the conclusion that our judgment against the attorney general, as relator, for costs in this cause, is right and ought not to be modified or set aside, but that in the language of the statute, "all costs taxed against such relator shall be paid by the State."

The petition is overruled, with costs.

Filed June 25, 1884.

Winship v. Block *et al.*

No. 11,604.

WINSHIP v. BLOCK ET AL.

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SUPREME COURT.—*Appeal.—Jurisdiction.—Amount in Controversy.*—No appeal will lie to the Supreme Court from a judgment in an action originating before a justice of the peace, under section 632, R. S. 1881, where the amount in controversy is less than \$50, exclusive of interest and costs; and when the plaintiff is content with the recovery of \$50 or less, no set-off or counter-claim having been asserted, the amount recovered will be deemed the amount in controversy, and an appeal by the defendant dismissed.

From the Rush Circuit Court.

W. A. Cullen and B. L. Smith, for appellant.

J. Q. Thomas, J. J. Spann, D. S. Morgan and W. T. Jackson, for appellees.

COLERICK, C.—This action was instituted by the appellees against the appellant before a justice of the peace of Rush county, Indiana, upon an account for goods sold and delivered. The appellant appeared to and defended the action before the justice of the peace, but filed no set-off or counter-claim. The case was tried, and resulted in the rendition of a judgment in favor of the appellees for \$53.76, and from this judgment the appellant appealed to the Rush Circuit Court, where the action was tried by the court upon the same issues as those tried before the justice of the peace, and judgment was rendered by the court on the 26th day of October, 1883, for \$40, in favor of the appellees, with which they are content, but the appellant has appealed therefrom to this court.

The appellees, upon notice to the appellant, have moved this court to dismiss the appeal, on the ground that the action originated before a justice of the peace, and as the amount in controversy, exclusive of interest and costs, does not exceed \$50, that this court has no jurisdiction in the case.

It is settled by an unbroken line of decisions that in order to give this court jurisdiction, under our present statutes, in cases originating before justices of the peace, the amount in

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controversy, exclusive of interest and costs, must exceed \$50. *Cowley v. Town of Rushville*, 60 Ind. 327; *Louisville, etc., R. W. Co. v. Jackson*, 64 Ind. 398; *Painter v. Guirl*, 71 Ind. 240; *Halleck v. Weller*, 72 Ind. 342; *Parsley v. Eskew*, 73 Ind. 558; *Sprinkle v. Toney*, 73 Ind. 592; *Pennsylvania Co. v. Trimble*, 75 Ind. 378; *Breidert v. Krueger*, 76 Ind. 55; *Wagner v. Kastner*, 79 Ind. 162; *Baltimore, etc., R. R. Co. v. Johnson*, 83 Ind. 57; *Louisville, etc., R. W. Co. v. Coyle*, 85 Ind. 516.

Where the plaintiff recovers \$50 or less, and is satisfied with the amount of recovery, and the defendant is merely resisting the recovery, and is asserting no set-off or counterclaim, then the amount so recovered is all that is in controversy. *Louisville, etc., R. W. Co. v. Coyle, supra*; *Painter v. Guirl, supra*; *Baltimore, etc., R. R. Co. v. Johnson, supra*.

As this court has no jurisdiction to hear and determine this case, the appeal must be dismissed.

PER CURIAM.—The appeal is dismissed, at the costs of the appellant.

Filed June 21, 1884.

No. 11,484.

HILL v. PRESSLEY.

SHERIFF'S SALE.—*Publication of Notice.—Computation of Time.*—The notice of a sheriff's sale to occur February 14th, published in a newspaper January 24th and 31st, and February 7th, is sufficient under the statute, sections 757 and 1280, R. S. 1881.

From the Superior Court of Marion County.

E. A. Parker, for appellant.

F. Winter, for appellee.

BICKNELL, C. C.—The appellant was the plaintiff below. At the special term a demurrer to his complaint was sustained; he refused to amend, and judgment was rendered

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against him upon the demurrer. He appealed to the superior court in general term, and there assigned for error the ruling upon the demurrer. The court in general term affirmed the judgment of the court in special term. The plaintiff appealed to this court.

He assigns for error here the affirmance by the court below in general term of the judgment of the court in special term.

The only question presented by the appellant in his brief is, was the notice of a sale of real estate by the sheriff, given by advertisement in a newspaper, in accordance with the statute?

The complaint avers that "the first publication of said notice was made upon January 24th, 1880; the second publication of said notice was made upon January 31st, 1880; the third publication of said notice was made upon February 7th, 1880, and said sale was made upon the 14th day of February, 1880."

The statute by which the case is governed is section 467, 2 R. S. 1876, p. 217, which is the same as section 757, R. S. 1881. It provides that "The time and place of making sale of real estate on execution shall be advertised by the sheriff" by advertising the same for three weeks successively next before the day of sale in a newspaper, etc.

The complaint states an advertisement in accordance with this section; but the appellant claims that the case is governed also by section 787, 2 R. S. 1876, p. 311, which is the same as section 1280, R. S. 1881, and which provides that "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last." He claims that under this last mentioned section, the first day of publication ought to be excluded, and that, excluding the first day of publication, there was not three weeks' successive publication next before the day of sale; thus, excluding the 24th of January, the first day of publication, and including the 13th of February, the last day of the three weeks' publication, there would seem to be only

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twenty days' publication, instead of twenty-one days. But here there was actually three weeks' successive publication, commencing on the 24th of January and ending on the 13th of February, the day before the sale. This satisfies the statute, section 467, *supra*, which governs this case. The other statute, section 787, *supra*, governs a different class of cases; thus, where the statute requires an act to be done within so many days from a given day or from a certain act, that day or the day of that act must be excluded. *Tucker v. White*, 19 Ind. 253; *Noble v. Murphy*, 27 Ind. 502; *State, ex rel., v. Thorn*, 28 Ind. 306; *Byers v. Hickman*, 36 Ind. 359. The same rule prevailed before the adoption of the code of 1852. *Hathaway v. Hathaway*, 2 Ind. 513.

But where notice is to be given, either by service or by publication, the notice necessarily begins to operate on the day of service, or on the day of the first publication, and then the only question is, has the notice been operating for the required length of time? Therefore, where ten days' service of process is required, service on the 10th day of the month for the 20th day of the month has always been held sufficient, because, in such a case, there are ten days of actual notice prior to the 20th; and so in case of publication, if the publication of the sale of real estate by advertisement in the newspaper has been in operation for three weeks successively next before the day of sale, the party has had the notice which the statute, section 467, *supra*, requires.

In *Loughridge v. City of Huntington*, 56 Ind. 253, this court held that publication for three weeks successively means a publication for twenty-one days.

In *Meredith v. Chancey*, 59 Ind. 466, it was held that the publication required by section 467, *supra*, is a publication for twenty-one days, excluding either the date of the first publication or the day of sale. In the present case there was a publication for twenty-one days excluding the day of sale.

In *Fox v. Allensville, etc., Co.*, 46 Ind. 31, it was held that
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where by statute notice of the time and place of payment of stock subscriptions was required to be given for thirty days by publication in a newspaper, it was sufficient, in an action on the subscription, to allege that the notice was given on the 2d of March for payment on the 1st day of the next April.

The appellant cites *Towell v. Hollweg*, 81 Ind. 154, but there is nothing in it, or in the case of *Smith v. Rowles*, 85 Ind. 264, in conflict with the cases hereinbefore cited. In *Towell v. Hollweg*, *supra*, the point decided was that the time for recording a chattel mortgage is computed by excluding the day on which it was executed, and including that on which it was recorded. In *Smith v. Rowles*, *supra*, the point decided was that the twenty days mentioned in section 467 had reference to the posting of notices, but that the advertisement in the newspaper must be for twenty-one days next before the sale. The court cited with approval *Loughridge v. City of Huntington*, *supra*, and *Meredith v. Chancey*, *supra*, and repeated, substantially, the doctrine of those cases.

The court below in general term did not err in affirming the judgment of the court in special term. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby in all things affirmed, at the costs of the appellant.

Filed June 25, 1884.

No. 10,792.

THE WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY
v. TRETTS.

PRACTICE.—*Motion to Strike Out.*—*Harmless Error.*—The refusal to strike out part of a complaint is a harmless error.

RAILROADS.—*Fencing.*—*Killing Stock.*—In a suit, under the statute, against a railroad company for killing stock, the material question is as to the fence at the place where the animals entered, and not at the place where they were killed.

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SAME.—*Duty to Fence Road.*—The obligation of a railroad company to fence its track exists except at places where a fence would impair the use of private property or the rights of the public, and it includes the duty of maintaining cattle-guards where they are necessary and proper to prevent access from intersecting highways.

PRACTICE.—*Evidence.*—*Bill of Exceptions.*—To present any question to the Supreme Court as to admitting evidence, objection must be specifically stated to the court below and shown by bill of exceptions.

SAME.—*Interrogatories to Jury.*—The court may refuse to send interrogatories to the jury which the attorney of the opposite party has had the opportunity to see until after he has closed his argument.

From the DeKalb Circuit Court.

C. B. Stuart, W. V. Stuart and J. E. Rose, for appellant.

C. Emanuel, for appellee.

ELLIOTT, C. J.—This action was brought by appellee to recover the value of a mare, alleged to have entered upon appellant's track at a point where it was not fenced, and to have been killed by the appellant's locomotive.

A motion to strike out part of the complaint was overruled, and this ruling is assigned as error. Many cases decide that such a ruling, even though erroneous, will not warrant a reversal.

The place of entry is the material question in cases of this character. If animals enter at a place where the railroad company was bound to fence, the company is liable, although they were killed at a point where the company was under no duty to fence. *Jeffersonville, etc., R. R. Co. v. Lyon*, 72 Ind. 107; *Ohio, etc., R. W. Co. v. Miller*, 46 Ind. 215; *Jeffersonville, etc., R. R. Co. v. Avery*, 31 Ind. 277; *Indianapolis, etc., R. R. Co. v. Adkins*, 23 Ind. 340. There was some conflict in the evidence in this case as to whether the place where appellee's mare entered upon the railroad track was one which the company was bound to fence, but we do not feel at liberty to disturb the verdict. It appears that the predecessor of appellant had for nine years kept the fence along the track where the mare entered, and that appellant had suffered it to become insecure. This, in connection with other evidence in

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the case, warranted the jury in inferring that the place was one which might have been fenced.

The statute makes no provision as to the places which may be left unfenced, but the courts, recognizing the necessity of excepting streets of towns and cities, and places where the business of the railroad companies demands that no fences be made, have engrafted exceptions upon the statute. These exceptions have been made, not to advance the private interests of railroad corporations, but to promote the public good by enabling the corporations to discharge their duty to the public. These exceptions exist only in cases where a necessity is shown. It was said in *Pittsburgh, etc., R. W. Co. v. Laufman*, 78 Ind. 319, that "it is not the province of the courts to create exceptions to the rule, or to interfere with the legislative policy, upon the ground suggested, or for any like reason." The ground referred to by the court was, that as the track was through a town numerous cattle-guards would weaken it. Many cases are cited, and we add *Indianapolis, etc., R. W. Co. v. Thomas*, 84 Ind. 194, where it was said: "For the exception is made because the general public have an interest in the proper operation of such great means of traffic and transportation, and not because the interests of the railroad corporation will be promoted." It must always appear from the evidence that there was a sufficient reason for not obeying the statute. The court said in *Indianapolis, etc., R. R. Co. v. Lindley*, 75 Ind. 426: "That the track of the road was not fenced at the place in question, is clearly shown; and the evidence falls far short of showing a good reason for not having fenced it." Again, it was said in *Wabash, etc., R. W. Co. v. Forshee*, 77 Ind. 158: "But whenever a railroad company can build and maintain such a fence, without interfering with the rights of the public or with the free use of private property, then it is bound to maintain the fence, whether it be in a city, or village or in the country. *The Ohio, etc., R. W. Co. v. Rowland*, 50 Ind. 349."

Where cattle-guards are necessary to keep animals from

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the track, it is the duty of railroad companies to construct them, unless some sufficient reason is shown excusing them from the performance of this duty. In *Grand Rapids, etc., R. R. Co. v. Jones*, 81 Ind. 523, the court said: "No railroad can be said to be securely fenced at an established crossing, where suitable cattle-pits have not been constructed." It was said in another case: "It is as much the duty of the appellant to fence against animals on the highway as against animals in adjoining fields or woods." *Evansville, etc., R. R. Co. v. Barbee*, 74 Ind. 169, *vide* authorities cited, p. 173.

In order to save questions upon rulings admitting evidence, specific objections must be stated to the trial court and incorporated in the bill of exceptions. *City of Delphi v. Lowery*, 74 Ind. 520 (39 Am. R. 98).

In so far as the sixth instruction asked by appellant stated the law correctly, it was embodied in the instructions given at the request of the appellant and those given by the court on its own motion. There was, consequently, no error in refusing the instruction designated.

After the argument had commenced, appellant presented to the court interrogatories, and requested that they should be propounded to the jury, but the court denied the request. It is not shown at what stage of the argument they were presented, but it is affirmatively shown that the counsel for appellee had no opportunity to see them until after he had concluded his argument. We think the court did right in refusing appellant's request. *Glasgow v. Hobbs*, 52 Ind. 239.

Judgment affirmed.

Filed June 25, 1884.

No. 11,374.

NEWCOMER v. ALEXANDER.

REPLEVIN.—*Complaint to Recover Goods in Execution.—Exemption.—Judgment.*

—A complaint in replevin against a sheriff by an execution defendant, alleging a taking, by levy of the writ, "though the plaintiff filed a

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schedule," and the property was of less value than \$600, but failing to show that the judgment on which the execution issued was founded on contract, and that the schedule was such as the law requires, is bad.

PLEADING.—*Demurrer.*—*Practice.*—A demurrer for want of facts to an answer should be sustained to the complaint if it be bad.

From the Hamilton Circuit Court.

A. F. Shirts and *W. R. Fertig*, for appellant.

T. J. Kane, *T. P. Davis*, *D. Moss*, *R. R. Stephenson* and *H. A. Lee*, for appellee.

FRANKLIN, C.—Appellee commenced this action in replevin against appellant as sheriff of said county, for certain personal property, describing it in his complaint, and alleging that he was the owner thereof; that appellant had levied upon it by virtue of an execution issued upon a judgment against appellee, and now holds the same; that appellee is a citizen and householder of said county, and entitled, under the law, as exempt from execution, to \$600 worth of property, and that the property claimed was of the value of \$566.20; that he filed a schedule of his property with said defendant as such sheriff, and demanded that it be set off to him, but the defendant refused so to do, and wrongfully detained said property from him.

The defendant answered this complaint by alleging that the judgment upon which the execution was issued was rendered on the bond of plaintiff as administrator of the estate of one Isaac Humbles, deceased, and that the relators in said action were creditors and heirs of said estate, and that the judgment was rendered upon the default of said plaintiff; that the alleged breach of his bond, upon which the judgment was rendered, was the wrongful and unlawful conversion of the assets of the estate to his own use, except the ten per cent. penalty included in the judgment, and that the plaintiff had not sufficient other property to satisfy the judgment.

A demurrer to this answer was sustained. The defendant refused to answer over, and judgment was rendered for the plaintiff. The errors assigned are, that the complaint

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does not state facts sufficient, and that the court erred in sustaining the demurrer to the answer.

A bad answer is good enough for a bad complaint, and when the plaintiff undertook to test the defendant's answer by a demurrer, he thereby submitted his complaint to a similar test, by the demurrer to the answer reaching back to the complaint, and no sufficient objection is lost by not demurring to the complaint.

This complaint is clearly bad. It does not show that the judgment upon which the execution was issued was "for any debt growing out of or founded upon a contract, express or implied." And it is only in such a case that the judgment defendant is entitled to the exemption. There is no presumption of this kind in his favor, and before he can be entitled to the exemption, he must show a case within the provisions of the statute. R. S. 1881, section 703. See the case of *Thompson v. Ross*, 87 Ind. 156. Nor does the complaint show what kind of a schedule the plaintiff presented to the sheriff; for aught that appears it may not have been verified, or in accordance with the provisions of the statute in any respect. The sheriff may have rejected the schedule for the reason of its non-compliance with the statute. But wherein the complaint fails to show this judgment was rendered upon a contract, the answer has supplied the defect. But as to what effect this may have upon extending the demurrer to the answer back to the complaint, we need not and do not decide, for the reason that the complaint is bad for the other causes named.

While the answer is good enough for a bad complaint, it would be bad for a good complaint, for it shows that the judgment was rendered upon the administrator's bond, which certainly sounds in contract; and, although the unlawful conversion of the assets of the estate was a wrong, yet the breach of the bond, and not the tort, was sued upon. The contract of suretyship on the bond was intended to cover such delinquencies and deficiencies.

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The court erred in sustaining the demurrer to the answer, instead of to the complaint, for which error the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things reversed, at the costs of appellee, and that the cause be remanded, with instructions to the court below to sustain the demurrer to the complaint, and for further proceedings.

Filed June 25, 1884.

No. 11,588.

STULTZ v. THE STATE.

INTOXICATING LIQUOR.—*Sale to Minor.*—*Evidence.*—As to evidence held sufficient to warrant a conviction for a sale of intoxicating liquor to a minor under section 2094, R. S. 1881, see opinion.

From the Greene Circuit Court.

E. E. Rose and *E. Short*, for appellant.

F. T. Hord, Attorney General, *J. D. Alexander*, Prosecuting Attorney, and *W. B. Hord*, for the State.

ZOLLARS, J.—Appellant was convicted upon an indictment of two counts, in which he was charged with having given and sold intoxicating liquors to a minor. The prosecution is based upon section 2094, R. S. 1881, which provides that whoever, directly or indirectly, sells, barter or gives away intoxicating liquors to a minor, etc., shall be fined, etc.

The only question made in this court is as to the sufficiency of the evidence. The boy to whom it is charged the liquor was sold testified that on the day named in the indictment, which was Sunday, he, in company with two other boys, went to a saloon where they met appellant. The witness said to him that he wanted some whiskey. Appellant answered that he could not let him have it. After making

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this answer, he went into the saloon and shortly thereafter to a barn that stood near by. Upon his return, the witness went behind the barn and found a half-pint bottle of whiskey upon a rock. This he picked up, left twenty-five cents in its place upon the rock, and returned to appellant and the other boys. He further testified that he saw no person, except appellant, go to the barn; that he had no understanding with appellant that the whiskey was to be left there for him, and did not know who left it there. After leaving appellant, the boys drank the whiskey. The other boys saw the parties conversing, but did not know what was said; saw appellant going to and returning from the barn, but did not know how the whiskey was procured; did not know that it had been procured until after they had left appellant.

This is the substance of the evidence. It at least tends to sustain the finding of the court below. If, as stated by the witness, there was no understanding that the liquor should be placed where it was, or where he might find it, the coincidence was a very remarkable one. If there was no such understanding, for what did appellant go into the saloon? By whom, and for what purpose was the liquor placed upon the rock? How came the witness to go to the barn upon the return of appellant? Why did he take the liquor and leave the money? For whom was the money left? Why did the witness not disclose his possession of the liquor until after he had left appellant? The declaration of the witness that there was no understanding between him and appellant is not a satisfactory answer to these inquiries, and the court below was not bound to accept it as such.

The manner and deportment of the witness, who testified to the remarkable occurrence, may have, and doubtless did, render material aid to the court below in arriving at the truth.

The judgment is affirmed, with costs.

Filed June 24, 1884.

Morningstar *et al.* v. Wiles *et al.*

No. 11,352.

MORNINGSTAR ET AL. v. WILES ET AL.

PLEADING.—*Misnomer.*—*Demurrer.*—Objection to a petition for the allowance of a claim against a receiver, on account of the omission to state the christian name of the claimant, is not properly raised by a demurrer.

From the Morgan Circuit Court.

L. Ferguson and *C. G. Renner*, for appellants.

G. W. Grubbs, *M. H. Parks*, *W. R. Harrison* and *W. E. McCord*, for appellees.

BLACK, C.—Certain claims of the appellees upon a fund held by a receiver appointed by the court below were presented by petitions and were allowed.

The appellants, the receiver and the person at whose suit he was appointed, assign as errors the overruling of demurrers of the receiver to the petitions, for want of sufficient facts, and the overruling of motions for a new trial made by the appellants.

The only objection suggested under the first assignment is the fact that the christian names of certain of the claimants were not given in their petitions. As to one of these, the record does not show that any judgment was rendered either for or against him.

In the only other instance contemplated by this objection, the petitioners' names were stated in their petition as "L. Mossler and — Mossler, under the firm name of L. I. Mossler & Bro."

The misnomer was not reached by the demurrer. *Peden v. King*, 30 Ind. 181; *Hahn v. Behrman*, 73 Ind. 120; *Hopper v. Lucas*, 86 Ind. 43; Bliss Code Pl., section 427.

The grounds assigned for a new trial were that the finding was contrary to law and contrary to the evidence.

Some written evidence introduced is not set out in the bill

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of exceptions. Upon a careful examination of the record we find no available error.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment be affirmed, at the costs of the appellants.

Filed April 17, 1884. Petition for a rehearing overruled June 25, 1884.

No. 10,864.

FLOOD ET AL. v. JOYNER ET AL.

VERDICT.—*Practice.*—*New Trial.*—Where there is a verdict against two, and one only moves for a new trial, he can make no question as to the verdict against the other.

CONTRACT.—*Evidence.*—*Receipt.*—A receipt for money paid on contract in part performance of it can not be regarded as a written contract so as to exclude parol evidence of the contract actually made.

From the Laporte Circuit Court.

M. Nye, for appellants.

W. B. Biddle and *C. H. Truesdale*, for appellees.

FRANKLIN, C.—Appellees sued appellants for work and labor in cutting, curing and stacking hay at \$1.50 per ton.

The parties agreed that the contract price was \$1.50 per ton, and that one-half thereof should be paid as each 100 tons of hay was stacked; but they disagreed as to when the other half should be paid. The contract was made in the summer of 1881, and appellees insist that the second half of the contract price was to be paid on or before the 5th day of November, 1881.

The suit was commenced on the 4th day of February, 1882, and the defendants insist that by the terms of the contract the second half of the contract price was not to be paid until the hay was pressed and marketed; that this had not been done; that the whole of the first half had been paid before the bringing of the suit, and that there was nothing due the plaintiffs at the commencement of the action.

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Issues were formed on the complaint; there was a trial by jury; verdict for the plaintiffs for \$119.12. A motion for a new trial was made, overruled, and judgment rendered upon the verdict. The overruling of said motion is assigned as error.

The reasons stated for a new trial are that the verdict is not sustained by sufficient evidence, is contrary to law, and the damages are excessive.

Appellants insist that appellant George Flood, in the transaction, was only acting as agent for appellant William Flood, which the plaintiffs well knew; that the finding of the jury and the judgment, as to him, if not as to William, are wrong, and that a new trial ought to be granted for that if for no other reason.

The motion for a new trial was only made by William; George was not a party to it, nor did he in any way object to the verdict of the jury, and he can not now be heard to make objection. The judgment may be wrong against him, but in this appeal William can not take advantage of any error that may have been committed against George; that objection does not appear to have been made in the court below, and can not for the first time be made here. *Priddy v. Dodd*, 4 Ind. 84; *Buell v. Shuman*, 28 Ind. 464; *Rardin v. Walpole*, 38 Ind. 146; *Feeney v. Mazelin*, 87 Ind. 226. As to William, the plaintiffs' evidence tended strongly to prove that the second half of the contract price for the labor was to be paid on or before the 5th day of November, 1881, and that the hay could have been weighed and marketed before the commencement of the action. The defendants' evidence tended equally strong to show that the second half of the agreed price was not to be paid until the hay had been marketed, and that it could not have been marketed on account of the condition of the weather and the locality of the hay, prior to the bringing of the action. Under this conflict in the evidence, this court can not weigh it and determine its preponderance.

The receipt given by one of the appellees to appellant William for a part payment on the first half of the contract price,

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dated in August, 1881, can not be construed to be the written contract between the parties, so as to exclude parol testimony as to what the contract was. A receipt is susceptible of explanation, and even contradiction, by parol testimony, and while the receipt was admissible evidence, as tending to prove what the contract was, it can not be regarded as the contract.

We see nothing in the evidence that requires a disturbance of the verdict and judgment on account of excessive damages.

There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is in all things affirmed, with costs.

Filed March 12, 1884. Petition for a rehearing overruled June 25, 1884.

No. 11,516.

HARTFORD v. THE STATE.

CRIMINAL LAW.—*Libel*.—*Statute Valid*.—Section 1925, R. S. 1881, providing punishment for publishing libels, is valid.

SAME.—A statute providing for the punishment of an offence is valid though it do not define the meaning of the words employed in describing the offence.

SAME.—The word "libel," as used in section 1925, R. S. 1881, must be taken in its common law sense, which is well expressed by section 1, Acts 1879, p. 154.

SAME.—*County School Superintendent*.—*Bribery*.—A newspaper publication, charging that a county superintendent of schools, for a consideration in money, had, by the use of his influence, induced the county board of education to order a change in school books, is a libel in the sense of the statute.

SAME.—A publication may be libellous which does not impute a crime.

SAME.—*Evidence*.—*Impeachment of Witness*.—Publications by a witness upon the subject to which his testimony relates are admissible in evidence to impeach his testimony.

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SAME.—Evidence.—Mitigation.—It may be shown in mitigation of punishment, in a criminal prosecution for libel, that the libel was provoked by a libel upon the defendant published shortly before by the prosecuting witness.

SAME.—Evidence.—Witness.—Instructions.—Weighing Evidence.—Jury.—The law does not require the jury, in weighing the evidence of a witness in a criminal case, to consider the fact that the witness is the defendant on trial, and it is error so to instruct.

SAME.—The testimony of a witness found by the jury to be true must be believed and acted upon, and it is error to instruct that it is only entitled to the same weight as that of other witnesses.

From the Switzerland Circuit Court.

A. C. Downey, W. R. Johnson and F. M. Griffith, for appellant.

F. T. Hord, Attorney General, and *E. G. Hay*, Prosecuting Attorney, for the State.

HAMMOND, J.—Indictment in two counts for libel. The appellant's motion to quash was sustained as to the first, and overruled as to the second count. Plea, not guilty; trial by jury; verdict of guilty, and fine of ten dollars; motion for a new trial overruled, and judgment on the verdict.

The indictment is predicated upon section 24 of "An act concerning public offences and their punishment," approved April 14th, 1881, reading as follows: "Whoever makes, composes, dictates, prints or writes a libel to be published, or procures the same to be done, and whoever publishes, or knowingly aids in publishing or communicating a libel, is guilty of libel, and shall, upon conviction thereof, be fined not more than one thousand dollars nor less than five dollars, to which may be added imprisonment in the county jail, for not more than one year nor less than ten days." Acts 1881, p. 177, section 1925, R. S. 1881.

It will be observed that the above statute does not define a libel. Section 237, R. S. 1881, which has been upon our statute books as in force since May 6th, 1853, declares that "Crimes and misdemeanors shall be defined, and punishment therefor fixed by statutes of this State, and not otherwise."

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But, for the past twenty years, the decisions of this court have been uniform that the above statute could not bind subsequent legislation, and that it is competent for the Legislature to prescribe penalties for the commission of an offence without defining it. *Wall v. State*, 23 Ind. 150; *State v. Craig*, 23 Ind. 185; *State v. Oskins*, 28 Ind. 364; *Burk v. State*, 27 Ind. 430; *Hood v. State*, 56 Ind. 263; *Sanders v. State*, 85 Ind. 318 (44 Am. R. 29).

Section 1 of an act approved March 15th, 1879, Acts 1879, p. 154, defined libel as follows: "That any false and defamatory printing, writing, sign, picture, representation or effigy, tending to expose any person to public hatred or ridicule, deprive him of the benefits of public confidence, or social intercourse, or designed to blacken and vilify the memory of a deceased person, and tending to scandalize and disgrace his relations and friends, shall be deemed a libel." This section was probably repealed by the criminal code of 1881, but as its definition of libel embraces all the substantial elements of the offence as recognized by the common law, it may, for convenience, be recurred to as affording a simple and satisfactory description of the constituent parts of the crime. 4 Blackst. Com. 150; 2 Bishop Crim. Law, sections 907-8; 2 Whart. Crim. Law, section 2535.

The prosecuting witness in this case was the county superintendent of schools in Switzerland county. At a meeting of the county board of education, presided over by the prosecuting witness, a change of certain text-books was made to the advantage, or supposed advantage, of a publishing house in Cincinnati. The appellant published in a newspaper in said county, over his own signature, an article entitled "A true statement of the facts," the substance of which was that an agent of the publishing house referred to had employed the appellant and the prosecuting witness to procure the change of the text-books by their influence before the board of education; that they used their influence, with success in this matter, and that for so doing they received from the agent of

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the publishing house \$125, which was paid by the agent to the appellant, and by him divided with the prosecuting witness. A copy of the publication was set out in each count of the indictment. The second count alleges that the appellant charged in such publication that the prosecuting witness was bribed by the agent of the publishing house and by the appellant in the matter of the change of text-books. It is claimed that there is a variance between the publication and the averments in the indictment as to the charges made in the publication, but in this we think the appellant's counsel are in error. The charges made against the appellant in the indictment are, in all substantial respects, sustained by the publication in question. The surname alone of the prosecuting witness appears in the article complained of, but the indictment charges that it was published of and concerning such witness. This was sufficient to show that the charges made in the publication related to the county superintendent, whose full name is set out in the indictment as being the person injuriously affected by the alleged libel.

The publication in question was clearly libellous. Whether it charged the prosecuting witness with a crime need not be decided. It imputed to him official corruption, and this, if believed, would certainly degrade him in the estimation of the public. A publication may be libellous without charging the commission of crime. *State v. DeLong*, 88 Ind. 312; *Johnson v. Stebbins*, 5 Ind. 364. There was no error in overruling the motion to quash the second count of the indictment.

The prosecuting witness, who testified in the case, had, as he admitted, published articles in a newspaper in reference to what occurred in regard to the exchange of text-books. There were three of these articles. One was published the week before, one on the same day of, and the other a week after, the publication made by the appellant. These articles were offered in evidence by the appellant, but, upon objection by the State, they were not admitted. It is claimed that there was a discrepancy between some of the statements made in these

publications and the evidence of the prosecuting witness at the trial. Whether there was or not such contradiction we express no opinion, but as the articles related to the same facts testified to by the prosecuting witness, the appellant, we think, had the right to put these articles in evidence, leaving the jury to determine whether there were any contradictions that in any way affected the credibility of the witness. The first article reflected severely upon the appellant, charging him with falsehood in circulating reports injurious to the county superintendent regarding his conduct in procuring the exchange of text-books. There was evidence tending to show that the appellant's publication, which he claimed was "a true statement of the facts in the case," was provoked by the publication of the first article by the prosecuting witness. Even though this publication by the prosecuting witness was libellous, it furnished no excuse or justification for that made by the appellant. The commission of one crime can be no defence for the commission of another. At the same time, however, the law is well settled that in civil actions for libel the defendant may, in mitigation of damages, show that the publication complained of was provoked by one, relating to the same subject, made by the plaintiff a short time prior to the defendant's publication. Townshend Slander and Libel, sections 414, 415 and 416; Odgers Libel and Slander, p. 306; 4 Wait Actions and Defenses, p. 313. We think that the same rule should apply in criminal cases, and that the first article published by the prosecuting witness should have been admitted in evidence as proper to be considered by the jury in mitigation of punishment. Circumstances of a mitigating character, and which are proper to be considered by the jury in fixing the penalty, may be introduced in evidence by the defendant in a criminal case. *Kistler v. State*, 54 Ind. 400; 1 Bishop Crim. Law, sections 948, 949. As the jury in the present case did not assess the lowest penalty prescribed by

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statute for the offence of libel, we can not say that the exclusion of the evidence offered by the appellant was harmless.

The court, among other charges, gave the jury the following :

"The defendant has testified in this case. The State could not compel him to testify, but the statute allows him to testify in his own behalf if he choose to do so ; and the statute also makes it the duty of the court to tell the jury that the fact that he is the defendant is a matter to be taken into consideration by the jury in determining what weight they will give to his testimony. But that is all there is of that ; the jury is to take the fact into consideration, and if, on so doing, the jury is satisfied that his testimony is true, they may give it all the weight due to the testimony of any other witness."

The learned judge *pro tempore*, who presided at the trial, was in error in saying to the jury that the statute made it his duty to tell them that the fact of the appellant being the defendant must be considered by them in determining what weight to give to his testimony. Where, in a criminal case, the defendant declines to testify in his own behalf, the court should instruct the jury that this fact is not to be commented upon, referred to, or in any manner considered by the jury. Section 1798, R. S. 1881. But where the defendant testifies in his own behalf, the statute imposes no duty upon the court to say anything to the jury that may tend to weaken the force of his evidence. If it was the duty of the jury, as a matter of law, to consider the fact that the appellant was the defendant, in weighing his evidence, then it would seem to follow that, as a matter of law, his evidence was entitled to less weight on account of the fact referred to. *Woollen v. Whitacre*, 91 Ind. 502. The charge clearly conveyed the idea that as a legal rule of evidence the testimony of the appellant was not entitled to as much weight as that of other witnesses, unless, after considering the fact of his being the defendant, they were still able to give him credit. In other words, the jury must have understood that the fact of the appellant being the defendant cast suspicion upon his evidence, entitling

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it to less weight than it would have been entitled to if he had been a disinterested witness. The latter part of the instruction, in any event, must be held erroneous. The jury were informed that, if they were satisfied that the appellant's testimony was true, they might give it all the credit due to the testimony of any other witness. If the jury were satisfied that his evidence *was true*, it was their duty to believe and act upon it without reference to other testimony. In such case it would not be merely entitled to the weight due the testimony of any other witness, but would be entitled to full belief, though contradicted by the evidence of other witnesses.

The jury both in criminal and civil cases are the exclusive judges of the evidence. In this they must be left untrammelled by the court's charges. If there is conflict in the evidence, the court may inform them that, as a matter of fact, they may consider the interest of a witness in determining his credibility, but it is error to tell them that such interest *must, as a matter of law*, be considered. It was said, in *Woollen v. Whitacre, supra*: "The court may properly say to the jury that, in considering the credibility of a witness, certain things may be considered by them; but it is error for the court to inform the jury, directly or indirectly, that such things *must, as a matter of law*, be regarded in determining the question of credibility. Whenever the court does so, it invades the province of the jury."

In *Pratt v. State*, 56 Ind. 179, it was held to be erroneous to instruct the jury, that, "If the witness is interested in the result of the prosecution, this tends to discredit it." The court said in that case: "It is laid down in this instruction, as a general proposition of law, that where a witness is interested in the result of the prosecution, without regard to the character of the interest, this tends to discredit him as a witness. It is not said that that is a circumstance which the jury have a right to consider and judge of for themselves, in determining the credibility, but they are told, as a matter of law, that that fact does tend to discredit him."

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In *Greer v. State*, 53 Ind. 420, the trial court had charged the jury as follows: "The defendant has testified in his own behalf. This testimony, however, is subjected to the usual test of credibility, as other interested witnesses. One interested will not, usually, be as honest and candid as one not so." Commenting on the instruction this court said: "We think the court erred in giving the latter part of the charge. The idea is conveyed by the charge, that, in a majority of instances, or as a usual rule, subject of course to exceptions, persons interested will not be as honest and candid as those who are not interested. This may be true, in point of fact, and if so, it is a sad commentary upon the honesty and candor of a majority of mankind. But, if the proposition be true, it is not a legal presumption, but matter of fact, of which the jury were the exclusive judges, and concerning which the court could not, without going out of its province, undertake to instruct them. It was the exclusive province of the jury to determine, from their knowledge of mankind, from the evidence in the cause, and from the appearance and manner of the witness, what credit was due to his evidence, and whether any, and if so, how much, credence should be withheld in consequence of his interest in the cause. It was, in short, the exclusive province of the jury to determine whether one interested would or would not usually be as honest and candid as one not interested." See, also, *Nelson v. Vorce*, 55 Ind. 455; *Millner v. Eglin*, 64 Ind. 197 (31 Am. R. 121); *Works v. Stevens*, 76 Ind. 181; *Fulwider v. Ingels*, 87 Ind. 414; *Finch v. Bergins*, 89 Ind. 360; *Dodd v. Moore*, 91 Ind. 522.

The appellant at the trial admitted the publication complained of. His defence was that it was true. In a criminal prosecution for libel at common law, its truth was no justification. This rule has been generally changed by statute in this country, and in this State by the Constitution. Section 10 of our Bill of Rights provides that, "In all prosecutions for libel, the truth of the matters alleged to be libellous may be given in justification." The appellant's evidence

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tended to prove the truth of the alleged libel for which he was prosecuted. This evidence was entitled to such weight as the jury thought proper to give it, in the light of all the facts and circumstances in the case. The jury were the exclusive judges whether these facts and circumstances affected the credibility of the appellant. If the appellant's evidence was entitled to less weight than that of other witnesses, it was so as a fact of which the jury were exclusive judges. It was not so as a matter of law which the jury were bound to consider.

There was error in overruling the appellant's motion for a new trial.

Judgment reversed, with instructions to the court below to sustain the appellant's motion for a new trial.

Filed June 26, 1884.

No. 11,453.

YEARLEY, ADMINISTRATOR, v. SHARP, ADMINISTRATOR.

DECEDENTS' ESTATES.—*Appeal to Supreme Court.—Dismissal of Appeal.*—

Where an administrator considers himself aggrieved by a decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, and prosecutes an appeal from such decision to the Supreme Court, he is not required to file any appeal bond; but he must file a transcript of the record, on his appeal, in the Supreme Court, at the latest, within twenty days after such decision was made, unless, "for good cause shown," such time has been extended by the Supreme Court. Otherwise a motion to dismiss the appeal must be sustained.

From the Delaware Circuit Court.

J. R. McMahan, for appellant.

W. Brotherton and C. E. Shipley, for appellee.

Howk, J.—This was a claim filed by the appellant, Yearley, as administrator *de bonis non* of the estate of Henry B. Trout, deceased, against the estate of Washington Trout, de-

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ceased, of which latter estate the appellee Sharp is administrator. The cause was put at issue and tried by the court, and, at the request of the appellant, the court made a special finding of facts and stated its conclusions of law thereon in favor of the appellee, the defendant below. The court rendered judgment in favor of the appellee and against the appellant on the first day of February, 1883, for the costs of suit. On the last day of January, 1884, the appellant filed a certified transcript of the proceedings and judgment in this cause, with his assignment of errors endorsed thereon, as and for an appeal therefrom, in the clerk's office of this court.

The appellee has moved this court in writing to dismiss the appeal in this case, for the following causes:

"1. The appeal was not taken in the time nor in the manner prescribed by law;

"2. The appeal was not taken in the time nor in the manner prescribed by sections 2454 to 2457, R. S. 1881; and,

"3. The decision and judgment from which said appeal was taken was rendered in the Delaware Circuit Court on February 1st, 1883, and the transcript was not filed in this court until January 31st, 1884, nor was summons from this court issued nor served upon appellee until after the expiration of the year following the date of the judgment, nor was time granted by this court to extend the period for taking such appeal beyond the twenty days allowed by law."

It will be observed from our statement of this case that the parties on both sides, plaintiff as well as defendant, were the administrators respectively of a decedent's estate. Unquestionably, therefore, an appeal from the decision of the trial court could be taken by the party aggrieved thereby only in the manner and within the time prescribed in sections 2454 to 2457, R. S. 1881. Section 2454 provides, in substance, that any person considering himself aggrieved by any decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, may prosecute an appeal to the Supreme Court, upon filing with the clerk

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of such circuit court a bond with penalty and surety, and payable and conditioned as therein required. In section 2457 it is provided, substantially, that where, as in this case, an appeal is taken by an administrator, he need not file an appeal bond. Section 2458 provides as follows: "Such appeal bond shall be filed within ten days after the decision complained of is made, unless, for good cause shown, the court to which the appeal is prayed shall direct such appeal to be granted on the filing of such bond within one year after such decision. But any person who is aggrieved, desiring such appeal, may take the same in his own name, without joining with any other person. The transcript shall be filed in the Supreme Court within ten days after filing the bond."

In the case in hand no appeal bond was filed, and, as the appellant was an administrator, none was required to be filed. Nor did the appellant make any application to this court for an extension of time within which he might lawfully perfect his appeal; but, without any leave, order or direction of this court, on the last day of the first year after the decision below was made, by which he considered himself aggrieved, he filed the transcript of this cause in the clerk's office of this court, as and for an appeal from such decision. The question presented for our decision, by the appellee's motion to dismiss the appeal so taken, may be thus stated: Does the statute authorize an appeal to be taken by an administrator in such a case, in the manner or after the lapse of time in which this appeal was taken? Or, more briefly, did the appellant take this appeal in conformity with the requirements of the statute? We are of opinion that these questions must be answered in the negative. In the sections of the statute above referred to, the legislative intent is clearly manifest that, in every case, where an appeal may be taken to this court from any decision of a circuit court, or judge thereof in vacation, in regard to any matter connected with a decedent's estate, the transcript must be filed in this court, at the latest, within twenty days after the decision complained of was

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made, unless, "for good cause shown," this court may direct that the appeal may be perfected after the expiration of that time, and within one year after such decision. The precise question here presented has never been considered by this court in any of its previous decisions, but we do not doubt the correctness of our conclusion. The appeal in this case was not taken in conformity with the requirements of the statute, and the appellee's motion to dismiss it must be sustained.

The appeal is dismissed, with costs.

Filed June 26, 1884.

No. 10,862.

GLENN v. DAILEY.

CONVERSION.—*Trover*.—*Agister*.—*Contract*.—*Negligence*.—*Answer*.—*Pleading*.

—To a complaint alleging the delivery of a horse to the defendant to be kept and pastured for a consideration, until the plaintiff would demand the horse, and that demand was made and the defendant failed and could not deliver the horse, an answer to the effect that the defendant was, by the terms of the contract, not to be responsible on account of any injury caused by a railroad passing over his farm, or loss or casualties resulting from insufficient fences to confine the horse, but failing to show that the failure to return the horse was caused by the railroad or insufficient fences, is bad on demurrer.

From the Bartholomew Circuit Court.

G. W. Cooper, for appellant.

N. R. Keyes, for appellee.

COLERICK, C.—The appellant sued the appellee to recover the value of a horse, alleged to have been lost while in the possession of the appellee. To the complaint, which consisted of two paragraphs, an answer, in four paragraphs, was filed. A demurrer was sustained to the third paragraph of the answer, and overruled to the second and fourth paragraphs. A reply of general denial was filed. The issues

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were tried by a jury, and resulted in a verdict in favor of the appellee, upon which, over a motion for a new trial, judgment was rendered against the appellant. The errors assigned are the rulings of the court upon the demurrers to the second and fourth paragraphs of the answer, and on the motion for a new trial.

The first paragraph of the complaint averred, in substance, that on the 17th day of June, 1882, the appellant, being the owner of a certain horse, describing it, entered into a contract with the appellee to safely keep and pasture the same on the appellee's farm in Bartholomew county, Indiana, for a consideration to be paid to him, until the appellant might request or demand the same; that under and pursuant to said contract appellee took said horse to pasture, and possessed and held the same; that afterwards, on the — day of August, 1882, the appellant made a demand on the appellee for the possession of the horse, and that he failed and refused to deliver or return the same, and is unable to do so, and that the appellee is indebted to the appellant in the sum of \$200, the value of said horse, which sum is due and wholly unpaid. Wherefore, etc.

The second paragraph of the complaint was, in substance, the same as the first, but contained the additional averments that the appellee carelessly and negligently placed the horse in a field upon his farm where the fences were down between said farm and the adjoining farm, not owned by the appellee, and that said horse strayed away, by reason thereof, to said adjoining farm, and was from there turned out upon the public highway; that appellant had made diligent search for the horse, but was unable to find it, or learn of its whereabouts, and that through the appellee's negligence and gross carelessness the horse strayed away as aforesaid, and was lost; that the appellant demanded possession of the horse of the appellee, who failed and refused to return it, or account for the same or the value thereof, to the appellant's damage \$200. Wherefore, etc.

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The second paragraph of the answer averred that the appellee was not, and had not been, at any time, engaged in the general business of keeping or pasturing horses for hire; that he was the owner of a farm in the vicinity of the town of Columbus, Indiana, the tillable land of which he cultivated, and kept the pasture land for his own use; that one Daniel Smith, who was the owner and keeper of a livery stable in said town of Columbus, and who kept a large number of horses, stated and represented to the appellee, prior to the times mentioned in the complaint, that he desired to put horses upon pasture from time to time, and requested of appellee the privilege of sending to the appellee's pasture such horses as he, Smith, might desire, on a proper compensation to be paid therefor by Smith, who was then and there informed by appellee that said farm was exposed on account of a railroad running through the same, and that the fences were sometimes down, and that he would not be responsible for any accidents or casualties happening to said horses by reason of said railroad, or by reason of said fences being down and the horses straying away, and that he would not take any horses to pasture unless the owners thereof would assume all risks and responsibilities on account of said railroad and fences; that Smith, under said arrangement, and not under any other or different one, did send horses from time to time to said pasture; that the appellant, prior to the time of placing his horse in pasture on appellee's farm, was keeping it in the livery stable of Smith, and requested Smith to obtain pasturage for it, and that Smith, under said arrangement with appellee, placed said horse in appellee's pasture; that appellant made no arrangement with appellee to pasture said horse, or pay for the same, but the same was taken under said arrangement with Smith, and upon the terms, as to price of pasturage, and as to appellee being relieved from any responsibility for accidents or escapes, as above set forth, and not otherwise. Wherefore, etc.

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The fourth paragraph of the answer was, in substance, similar to the second paragraph, the material averments of which have been recited above. Both of these paragraphs purported to answer the entire complaint. It is quite clear that neither of them stated facts sufficient to constitute a defence to the cause of action set forth in the first paragraph of the complaint, which was founded upon the alleged refusal or failure of the appellee to surrender on demand the horse which was placed in his possession by the appellant for safe-keeping, and contained no averment that the horse had been lost while in the possession of the appellee. For aught that appeared in this paragraph of the complaint, the inability of the appellee to return the horse may have been occasioned by some cause other than those excepted by the terms of the contract mentioned in the answer. To make the answer sufficient as to the first paragraph of the complaint, it was essential to aver therein that the inability of the appellee to surrender the horse was occasioned by or through one of the causes excepted by the contract, and on the happening of which he was to be exempted from liability. No such averment was made in either of said paragraphs of the answer, and for that reason the court erred in overruling the demurrers thereto, and for the error so committed the judgment ought to be reversed.

In view of the conclusion which we have reached, it is unnecessary to decide the questions presented by the motion for a new trial, as they may not arise on another trial of the case.

PER CURIAM.—The judgment of the court below is reversed, at the costs of the appellee, and the cause is remanded with instructions to sustain the demurrers to the second and fourth paragraphs of the answer, and for further proceedings.

ELLIOTT, C. J., took no part in the determination of this cause.

Filed June 26, 1884.

Gerard v. Dill.

No. 10,630.

GERARD v. DILL.

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| 98 | 476 |
| 125 | 399 |

WORK AND LABOR.—Set-Off.—Implied Contract.—Member of Family.—Account.—To a common count for work and labor, an answer of set-off, or in bar, averring that the plaintiff, being a child four years old, destitute and abandoned by his parents, was taken by the defendant, as an act of charity, and without contract, and provided for, nurtured and educated as a member of his family, and containing a statement of account therefor, is bad as a bar, inasmuch as it does not deny the implied contract to pay for the labor which is shown by the complaint, nor state facts implying such denial, and bad as a set-off because it shows that the acts done for the plaintiff were gratuities.

From the Montgomery Circuit Court.

P. S. Kennedy and *W. T. Brush*, for appellant.

A. D. Thomas, for appellee.

ZOLLARS, J.—Appellee brought this action in the court below to recover from appellant for work and labor. The complaint is in two paragraphs. The second is based upon a breach of an alleged express agreement to pay in certain specific articles. The first is a common count for work and labor, in which the labor is averred to have been of the value of \$1,200, and to have been performed at the special instance and request of appellant, between 1866 and the 5th day of August, 1881. To this paragraph a general denial and two special answers were filed, to all of which, except the general denial, a demurrer was sustained. Upon the verdict of a jury, judgment was rendered against appellant for \$50.

The evidence is not in the record. No question is made in this court except upon the ruling of the trial court in sustaining the demurrer to the answers.

The first paragraph of the complaint makes a case of a promise, on the part of appellant, to pay what the labor was reasonably worth. The work having been performed at his instance and request, as alleged, the law implies a promise to pay a reasonable compensation. The answers indicate that

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the second was pleaded as a set-off, and the third in bar, but we think that neither is good for the purpose it seems to have been intended. In the second it is stated, substantially, that in 1866 appellee was a child of four years of age, without home or care, having been abandoned by father and mother; that as an act of *charity*, and without any contract whatever, appellant took him to his, appellant's, home, cared and provided for, nurtured, raised and educated him as one of his own family, etc. The several items for board, clothing, schooling, etc., are set out, with a prayer that the value of the same be set off against the claim of appellee, as stated in the first paragraph of the complaint.

In the third paragraph the same facts, substantially, are set up, and the statement repeated that what was thus done for appellee by appellant was as an act of *charity*, and without any contract with any one. The purpose of the pleader seems to have been to bring the case within the doctrine of those cases holding that where a child is thus taken into a family, and provided for as a member thereof, the benefactor can not recover for the support furnished, nor the child for labor performed while this relation exists, in the absence of a contract therefor. Clearly, the complaint does not state a case within that doctrine, nor do the answers bring the case within it.

We have no doubt that the main facts set up in the second answer, omitting the declarations of gratuity on the part of appellant, might have been so pleaded as to constitute a valid set-off, and we are inclined to the opinion, although it is not necessary for us to so decide in this case, and we do not decide, that those main facts might have been so pleaded as to constitute a bar to a recovery under the first paragraph of the complaint. As we have said, the first paragraph of the complaint states facts from which the law implies a promise to pay a reasonable compensation for the labor. This promise the answers do not negative, nor do they state facts from which the law implies such negative. The statements in the answers, "without any contract whatever," apply only to the acts per-

formed by appellant, and not to the labor by appellee. The case, then, stands upon the declaration in the complaint that appellee performed the labor at the special instance and request of appellant, from which the law implies a promise to pay, and the statements in the answers, that the care, nurture, etc., by appellant, were without contract, and as an act of charity. Charity, as defined by the lexicographers, means benevolence, a gift, benefaction, or gratuity to the poor.

Appellant clearly had the right, if he saw fit, to perform the generous offices without contract for pay, and as a charity, or gratuity, and at the same time remain liable upon an implied promise to pay appellee for his labor. This he seems to have done, as we must judge of his acts from the case before us. There being no promise, express or implied, on the part of appellee to pay for the kindly offices, but, on the contrary, they having been rendered as a charity, appellant can not now be heard to set them up as a set-off or in bar of appellee's claim for labor performed as in the complaint alleged.

It follows, therefore, that the trial court did not err in sustaining the demurrer to the answers.

The judgment is affirmed, at the costs of appellant.

Filed Oct. 10, 1883. Petition for a rehearing overruled June 26, 1884.

No. 11,575.

EBERHART v. REISTER.

PLEADING.—*Negligence.*—*Arrest of Judgment.*—A complaint to recover for an injury from a vicious animal, which fails to show that the plaintiff was free from fault, is bad on motion in arrest of judgment.

SAME.—Where a complaint fails entirely to aver a fact essential to the plaintiff's right of recovery, and contains nothing from which that fact might be inferred by liberal intendment, the judgment should be arrested.

From the Gibson Circuit Court.

Eberhart v. Reister.

W. M. Land and J. B. Gamble, for appellant.

C. A. Buskirk and W. L. Smith, for appellee.

ELLIOTT, C. J.—The complaint of the appellee alleges that “the defendant wrongfully and injuriously did keep a dog of a savage and ferocious nature, he, the defendant, knowing that said dog was accustomed to bite mankind,” and that it did bite and injure the appellee. There is no allegation in the complaint that the plaintiff was without fault, nor are there any facts from which it can be inferred that she was not guilty of contributory negligence, and it is contended, that for the want of the averment that the plaintiff was without fault, and because of the absence of facts from which that conclusion may be inferred, the pleading is bad on the motion in arrest of judgment.

Controlled by the ruling in *Williams v. Moray*, 74 Ind. 25 (39 Am. R. 76), we must hold that it is necessary for a plaintiff, in an action to recover for injuries caused by the bite of a vicious dog, to prove that he was free from contributory negligence. So, too, does that case require it to be held, that where a complaint to recover for injuries inflicted by a vicious animal fails to show that the plaintiff was without fault, it is bad on demurrer. But the question of the sufficiency of the complaint was not tested by demurrer, and many defects which a demurrer would reach are cured by a verdict. *Jones v. White*, 90 Ind. 255; *Martin v. Holland*, 87 Ind. 105; *Puett v. Beard*, 86 Ind. 104; *Jenkins v. Rice*, 84 Ind. 342; *Parker v. Clayton*, 72 Ind. 307; *Shimer v. Bronnenburg*, 18 Ind. 363.

There are defects in pleadings which a verdict will not cure. Where there is a material fact lacking, the pleading is not cured by the verdict, unless it states other facts from which, by liberal intendment, the omitted fact can be supplied. Where there are no allegations touching the subject, then there are no grounds which will support an inference, or which will supply reasons for an intendment, that the omitted fact was proved. Facts not alleged, and which are

not implied in or inferable from those which are alleged, can not be presumed to exist, nor can it be presumed that they were proved to the jury. Gould Pl., ch. 10, section 12. The rule is somewhat more broadly stated in an early English work, but it is not supported by authority. In commenting upon the statement of the rule of which we have spoken a recent writer remarks: "But this language is too broad, for it has always been limited, both in England and the United States, to cases where the plaintiff had stated his cause of action defectively or inaccurately, and has never been held to apply where there had been a total omission to state it—where the statement of some fact essential to the cause of action had been wholly omitted." Bliss Code Pl., section 438. Our cases lay down the rule that where an independent fact essential to the cause of action is omitted, the pleading will be bad on a motion in arrest. *Dickerson v. Hays*, 4 Blackf. 44; *McMillen v. Terrell*, 23 Ind. 163; *Pierse v. Thornton*, 44 Ind. 235; *Sharpe v. Clifford*, 44 Ind. 346; *Heddens v. Younglove*, *Massey & Co.*, 46 Ind. 212; *Newman v. Perrill*, 73 Ind. 153.

A fact essential to the appellee's cause is that she was free from fault, and upon this subject there is no allegation at all in the complaint; for all the facts stated in it relate to the negligence of the appellant. There are, therefore, no facts from which it can be inferred that she was not guilty of contributory negligence. There is absolutely nothing upon that subject, and, of course, nothing that will supply grounds for an intendment. If there were any facts at all bearing upon that subject, then a liberal intendment would be indulged, but without some grounds intendment is legally impossible. Facts constituting negligence on the part of the defendant do not necessarily show that the plaintiff was without fault. *Wabash, etc., R. W. Co. v. Johnson*, ante, p. 40. There may be cases where in stating the facts constituting the defendant's negligence, the plaintiff's freedom from negligence is made to appear, but the present case does not belong to that class. The facts stated in the complaint before us bear en-

Eberhart v. Reister.

tirely upon the negligence of the defendant. For anything that appears, or for aught that by the most liberal intendment can be inferred, the plaintiff's own negligence was the direct cause of her injury.

The mistake of the pleader in this case was not the omission to state a "particular circumstance" or a minor fact, but it was the omission to state a general fact essential to his cause of action. It is true that the appellee could not have recovered without proving that she was not guilty of contributory negligence; but it does not follow that because of this the verdict makes the complaint good. A plaintiff can not recover without proving negligence on the part of the defendant, and surely no one would contend that a complaint utterly silent as to the defendant's negligence would be good after verdict. It will not do to argue, as does the appellee, that because a fact must be proved, to entitle the plaintiff to a recovery, therefore the verdict aids the complaint. There is a glaring fallacy in such a course of reasoning. Counsel's quotation from Blackstone does not sustain their contention, for the author was speaking of inaccuracies in pleading minor facts or circumstances, and was not, in the clause quoted, speaking of the omission to plead independent facts essential to the right of action. The language quoted, taken in connection with what precedes and follows it, will not bear the meaning annexed to it by counsel. To make good our assertion we need quote only a single sentence: "But if the thing omitted be essential to the action or defence, as if the plaintiff does not merely state his title in a defective manner, but sets forth a title that is totally defective in itself, or if to an action of debt the defendant pleads not guilty instead of *nil debet*, these can not be cured by a verdict for the plaintiff in the first case, or for the defendant in the second." 2 Chitty's Blackstone, p. 304.

Minor facts may sometimes be involved in principal ones, but a principal and independent fact can not, as a general rule,

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be contained in any other in such a sense as to dispense with its statement in pleading; at all events, it can not be held that where there is no more than a charge of negligence against the defendant, a verdict will cure an omission to show, in some form, that the plaintiff was free from contributory negligence. Judgment reversed.

Filed June 26, 1884.

96 482
136 684

No. 9355.

RADCLIFF ET AL. v. RADFORD.

DEMURRER TO EVIDENCE.—*New Trial.*—Where there is a demurrer to evidence, a motion for a new trial is not admissible.

SAME.—Upon a demurrer to evidence, every reasonable inference against the demurrant, which might be drawn by a jury, must be taken as true by the court.

RESULTING TRUST.—*Husband and Wife.*—*Conveyance.*—*Agreement.*—Where a husband buys land with his wife's money, taking a deed therefor in his own name, without her consent, or with her consent, agreeing orally to hold the land in trust for her, a trust results in her favor under section 2976, R. S. 1881.

BILL OF EXCEPTIONS.—*Partition.*—*Report of Commissioners.*—A bill of exceptions is necessary to present, in the Supreme Court, error of the court below in refusing to set aside a report of commissioners in partition.

From the Morgan Circuit Court.

W. R. Harrison, W. E. McCord, S. Claypool and W. A. Ketcham, for appellants.

G. W. Grubbs and J. H. Jordan, for appellee.

BICKNELL, C. C.—This was a suit to enforce a trust in land held by a husband for the use of his wife, and, after her death, for the use of her two children by a former husband, they being her only heirs. The appellee was the survivor of these children, and was the sole plaintiff. The other child died, leaving issue, who were not parties to the suit.

The complaint, in each of its paragraphs, states that, in August, 1838, the husband and wife bought the land jointly, and that one-half the land was paid for with the separate

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money of the wife, and each of the paragraphs states a trust valid under section 8 of our statute of trusts, 1 R. S. 1876, p. 916; and that the husband and wife occupied the land together during their joint lives, the husband afterwards remaining in possession until he died in 1879; that during his lifetime he always acknowledged the existence of said trust, but by his will he devised the land to the defendant Sarah Radcliff, who was his second wife, during widowhood, and if she should marry again, then to the other defendants, who were his brothers and sisters; that said Sarah is in possession of the land, and, although requested, refuses to convey to the plaintiff any part of it. The complaint prays that one-fourth of the land be decreed to be held in trust for the plaintiff; that the title thereto be vested in him; that partition be made, and that said one-fourth be set off to the plaintiff, and that he may have other proper relief.

Demurrers to these paragraphs for want of facts, etc., were overruled by the court. The defendants answered jointly in five paragraphs, and the defendant Sarah Radcliff filed a cross complaint against the plaintiff. Demurrers to the cross complaint and to each of the defences except the first, which was the general denial, were overruled. The plaintiff answered the cross complaint by a general denial, and replied to each of the special defences by a general denial.

The cause was submitted to a jury for trial. After hearing the plaintiff's evidence the defendants demurred thereto. This demurrer was overruled by the court, who found for the plaintiff, that he is entitled to one-fourth in value of the land, and to partition, and found upon the cross complaint that said Sarah Radcliff was not entitled to have her title quieted. The defendants' motion for a new trial was overruled, and an interlocutory judgment was rendered upon the finding, and commissioners of partition were appointed, who assigned to the plaintiff one-fourth of the land, to wit, forty acres.

The defendants' motion to set aside the report of the commissioners was overruled.

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The defendants' motion in arrest of judgment was overruled. Final judgment was rendered that the plaintiff should have, use and enjoy said forty acres in fee simple, and that his title thereto should be quieted, and that he should recover his costs.

The defendants appealed, assigning errors:

1. In overruling the demurrers to the complaint.
2. In overruling defendants' motion to suppress parts of the depositions of Jane Rosell and Catherine Duncan.
3. In overruling the demurrer to the evidence.
4. In overruling the motion for a new trial.
5. In overruling the motion to set aside the commissioners' report in partition.
6. In overruling the motion in arrest of judgment.

As to the fourth of these assignments, viz., overruling the motion for a new trial, this court held in *City of Indianapolis v. Lawyer*, 38 Ind. 348, that an exception to the ruling upon a demurrer to evidence sufficiently presents the question, on appeal, as to the correctness of the ruling, without a motion for a new trial, and in the same case, on page 371, the court declined to decide whether a motion for a new trial was right or not, but said, "We think, however, that no good reason was shown for the granting of a new trial, if in such a case a new trial could have been granted." In *Strough v. Gear*, 48 Ind. 100, the court held that where there is a demurrer to evidence, a motion for a new trial is unauthorized, unless it relates to an assessment of damages. The court gave no authority for this ruling, but it follows necessarily from the nature of a demurrer to evidence.

Demurrer to evidence is an admission of the truth of the fact alleged by the adverse party, or an acknowledgment that the evidence produced by him at the trial of the cause is true, but a denial of its operation and effect in law, whereupon the party demurs and prays the judgment of the court; for the fact being agreed on, the judges are the proper expositors of the law and are to determine the same, and not the jury. 7 Bacon Ab., Ed. of 1860, p. 672; Co. Litt. 72. There-

fore, originally, the adverse party could not be compelled to join in the demurrer unless the evidence was documentary; parol evidence was considered too uncertain; but afterwards it was held that in case of parol testimony, if the party demurring would make the facts certain by admitting the truth of the evidence and of all inferences of fact which might legitimately be made thereupon, then the adverse party would be compelled to join in the demurrer. 7 Ba. Ab. 674; *Gibson v. Hunter*, 2 H. Bl. 187. And such is the law now except that no formal joinder in demurrer is required. *Griggs v. Seeley*, 8 Ind. 264; *Andrews v. Hammond*, 8 Blackf. 540.

In *Chapize v. Bane*, 1 Bibb, 612, there was a demurrer to the evidence, and the party demurring had excepted to the introduction of depositions over his objection. The court said: "As the defendant's objection was improperly overruled, and the same evidence was demurred to by him, and appears material in the case, this exception, if not waived by the demurrer, would stand in the way of a judgment for the plaintiff. It seems, however, that the one party can not be permitted to rely on an exception to the admissibility of evidence, and to have a demurrer to the same evidence. By demurrer to the evidence he has supplanted his bill of exceptions. The demurrer admits the truth of the evidence, but questions its relevancy and sufficiency. The *particular manner* in which an *admitted truth* has been introduced into the cause as evidence, does not seem to be of any importance."

In the case at bar there were three reasons alleged for a new trial: 1. That the finding and judgment were contrary to the law and the evidence. 2. That the court erred in refusing to suppress certain depositions, and in admitting certain parol testimony, and in overruling the demurrer to the evidence. 3. That the court erred in its finding and judgment.

As to this last reason it will be observed that there was no exception to the form or substance of the judgment, and no motion to correct it. *Smith v. Tatman*, 71 Ind. 171.

In *Miller v. Porter*, 71 Ind. 521, this court held that by de-

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murring to evidence the party waives all objections to its admissibility. Under these rulings the motion for a new trial in this case presents no question.

The second error assigned, relating to the suppression of depositions, is not a proper assignment of error. Buskirk Pr. 114, 224.

As to the first error assigned, the first paragraph of the complaint states that one-half of the land was paid for with the wife's money; that the husband took the deed in his own name without her consent.

The second paragraph states that the husband bought half of the land with his wife's money, and took the deed in his own name, and that by agreement, without fraudulent intent, he was to hold the same in trust for her.

In each of these cases a trust arises under our statute, 1 R. S. 1876, p. 916, and was always recognized in equity before any such statute was enacted, *Elliott v. Armstrong*, 2 Blackf. 198; *Jenison v. Graves*, 2 Blackf. 440; *Blair v. Bass*, 4 Blackf. 539; and may exist without any writing. 2 Story Eq. Jur., section 1195. There was, therefore, no error in overruling the demurrers to the complaint. As to the third error assigned, the evidence comes up without a bill of exceptions. *Baker v. Baker*, 69 Ind. 399.

Did the evidence prove a trust as alleged in the complaint? Upon the demurrer to the evidence, if the existence of the trust could be reasonably inferred from the evidence, it was the duty of the court to overrule the demurrer. If a jury, upon any reasonable construction of the evidence, might have found against the defendant, the court may do so. The court, in such cases, may do all that a jury might reasonably have done. *Griggs v. Seeley*, *supra*; *Thomas v. Ruddell*, 66 Ind. 326.

In *Pinnell v. Stringer*, 59 Ind. 555, and in *Eagan v. Downing*, 55 Ind. 65, the rule is thus stated: "On a demurrer to evidence, everything will be taken against the party demurring which the evidence tends to prove, including every fair inference to be drawn from the evidence."

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In *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261 (38 Am. R. 134), this court said: "The court, on the demurrer to the evidence, was bound to take, as true, all the facts which the evidence tended to prove, and such inferences from them as the jury might fairly have drawn, though the jury might not have drawn such inferences."

In *Lenmon v. Whitman*, 75 Ind. 318 (39 Am. R. 150), the court said: "The proof necessary to support the plea, especially upon a demurrer to the evidence, may be both equivocal and indefinite, and yet be deemed sufficient." And see *Trimble v. Pollock*, 77 Ind. 576.

If a jury, upon the testimony in this case, had found for the plaintiff, their verdict could not have been set aside as unsupported by evidence; they might fairly have inferred from the evidence the existence of the trust as alleged in the complaint. There was, therefore, no error in overruling the demurrer to the evidence.

The fourth specification in the assignment of errors has already been considered.

The fifth error assigned is the refusal of the court to set aside the report of the commissioners of partition. This is a proper assignment of error.

In *Clark v. Stephenson*, 73 Ind. 489, this court said: "If the objection be to the report, or to the conduct of the commissioners, the proper practice is to move to set aside or to vacate the report; and, if the ruling of the court be adverse, to save the exception by a bill of exceptions, showing the motion, the grounds of objection, the proofs made, if any, and the action of the court; and, in this court, the error should be assigned directly on that action, just as upon a ruling on a demurrer."

In this case, although the record shows a motion to set aside the report of the commissioners, and that such motion was overruled by the court, and that the defendants at the time excepted thereto, yet there is no bill of exceptions there-

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upon. This assignment, therefore, presents no question. *Kesler v. Myers*, 41 Ind. 543; *Angevine v. Ward*, 66 Ind. 460.

The sixth and last assignment of error is the overruling of defendant's motion in arrest of judgment. The reasons alleged therefor are: 1. That the complaint does not constitute a cause of action. 2. That the plaintiff's reply to the defendants' answer does not constitute a reply to defendants' answer.

It follows from what has already been said that there was no error in overruling the motion in arrest of judgment.

There is no available error in the record. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

Filed Nov. 3, 1882.

ON PETITION FOR A REHEARING.

BICKNELL, C. C.—The appellants insist that this is a case where the money belonging to the wife at the time of the marriage became, under the law then in force, her husband's money, and that when he used the same in the purchase of land, and took the deed therefor in his own name, the land became his absolutely, and was not subject to any trust in favor of his wife.

It is claimed that this case is governed by *Waldron v. Sanders*, 85 Ind. 270, and *Westerfield v. Kimmer*, 82 Ind. 365. In these cases it was decided that, prior to the legislation of 1852, the money of the wife, held by her at the time of her marriage, was vested absolutely in her husband by the marriage, and might be disposed of by him at his pleasure, and that if such money were delivered by her to him, upon his promise to invest it in land for her and in her name, such promise was without consideration and invalid, and that, if reduction to possession were necessary, his taking and holding the title to such land in his own name was an effectual reduction into possession.

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These cases hold that there was no resulting trust in favor of the wife under such circumstances, because, as the law then stood, the money was not hers. But, prior to 1852, a woman might be the owner of money, which would not upon marriage become her husband's, as where it was settled upon her to her sole and separate use, or where she held it as trustee. To such cases, and to all cases where the evidence shows that the money remained the property of the wife notwithstanding the marriage, the cases of *Waldron v. Sanders* and *Westerfield v. Kimmer*, *supra*, do not apply.

If there were nothing in the case at bar except the facts that the husband, prior to 1852, bought a tract of land and paid for it, one-half with his own money, and the other half with money which his wife had at the time of their marriage, and had afterwards delivered to him upon his promise to invest it in land for her, and that he, in violation of the promise, had taken the deed for the land in his own name, the cases above cited would be decisive against the existence of any trust in favor of the wife.

But the evidence shows much more than this. It shows that when this husband and wife came to Indiana, in 1838, they each had \$500. It was possible even then for a wife to hold property separate from her husband. It is not expressly shown how the property of this wife was held, except that she derived it as a daughter and as a widow, and probably held some of it in trust for her children, but, conceding that the mere fact that the money was hers at the time of the marriage authorizes the presumption that by the marriage it became her husband's, the evidence shows very clearly that he never made any claim to the money, or asserted any right to it. He never spoke of it in any other way than as his wife's money. He stated to a great many witnesses, at many different times, that the money paid for the land was \$1,000, of which \$500 was the money of his wife.

Mrs. Jane Rosell testified: "Mrs. Radcliff collected in her money about the time she went to Indiana. They both said

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they put their money together and bought land. He said that her money and his had helped to purchase the land, and that the land was as much hers as his."

Catherine Duncan testified: "I heard them both say they had bought land with the money. He said she put in \$500. He said her money had helped pay for that land. He said his wife's money had helped pay for that home."

William Mabee testified: "He said that when they came to Indiana he had \$500, and his wife had \$500, and that they bought the home place there with that money; and again he said that he and Nancy had each furnished \$500 to buy the home farm."

Mrs. Schofield testified: "I heard them both say they had bought the home farm in partnership; that one had put in just as much as the other."

Mrs. Ann Ulery testified: "They said they each had \$500, and he said she had put in as much as he had."

Six other witnesses testified to the same effect, and this mass of testimony was not contradicted by a single witness. Here were statements made by Radford at many different times, beginning a year or two after the marriage and ending quite recently, and there is no evidence at all tending to show that the money was not Mrs. Radcliff's money, except the mere fact of the marriage.

But, as already suggested, a wife, prior to 1852, might have money of her own notwithstanding her marriage, and although, in the absence of evidence, the presumption would be that money held by the wife before marriage was vested in the husband by the marriage, yet the testimony above referred to clearly rebuts such a presumption, and shows that the money in controversy was not the husband's money, but belonged to his wife, and also shows that one-half the land belonged to the wife. The demurrer to the evidence admitted all the facts and all the inferences which a jury might rightfully have made from the testimony. The controlling facts, thus admitted, are, that one-half of the money paid was the

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wife's money, and not the money of the husband, and that she was the owner of half the land; that it was "as much hers as his;" that she paid \$500 of the money and he paid the other \$500.

Then, the only question is, did a trust arise in equity, prior to 1852, in favor of the person whose money paid for land, the title to which was taken in the name of another? Undoubtedly it did. *Elliott v. Armstrong*, 2 Blackf. 198; *Blair v. Bass*, 4 Blackf. 539; *Jenison v. Graves*, 2 Blackf. 440. These cases all hold that if A. purchased land with B.'s money, and took the conveyance in his own name, he held the land in trust for B. There is no better evidence against a man than his own declarations continuously reiterated throughout manhood and age for more than thirty years.

It can not be said that the demurrer to the evidence should have been sustained for the reason that the evidence does not sustain the complaint; the evidence does sustain the complaint.

The petition for a rehearing claims also that the judgment ought to be reversed because it was for too much land; but it was for the quantity of land demanded in the complaint, and there was no objection made to the judgment in the court below either as to form or substance. *Smith v. Tatman*, 71 Ind. 171; *Ingel v. Scott*, 86 Ind. 518.

The petition for a rehearing ought to be overruled.

PER CURIAM.—The petition for a rehearing is overruled.

Filed June 27, 1884.

No. 11,451.

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SUPREME COURT.—*Waiver of Defect of Parties.*—The submission of a cause by agreement in the Supreme Court is a waiver of a defect of parties to the appeal.

EXECUTION.—*Leave to Issue.*—*Demurrer.*—An application for leave to issue execution under section 675, R. S. 1881, made by another than the plaintiff, is sufficient on demurrer, if it state that the applicant owns the judgment without stating the facts showing such ownership.

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SAME.—Principal and Surety.—Discharge of Surety.—Notice to Sue.—Failure to Issue Execution.—Where a surety by notice requires the creditor to sue, according to section 1210, R. S. 1881, a failure to issue execution within a reasonable time after judgment, discharges the surety giving the notice, but not a co-surety not giving notice.

From the Fountain Circuit Court.

T. F. Davidson, L. Nebeker, H. H. Dochterman and J. E. Schoonover, for appellants.

J. McCabe, L. P. Miller and C. M. McCabe, for appellees.

HAMMOND, J.—This was a proceeding by the appellees to revive a judgment rendered in the court below in favor of John M. Carnahan, as guardian of one of the appellees, and another, against the appellants and three others. The appellants have each assigned separate errors. There was a submission of the cause in this court by agreement on January 30th, 1884. No brief having been filed by the appellant Alexander Whitehall, the appeal as to him, on the appellees' motion, is dismissed under Rule 14 of this court.

The appellees also move to dismiss the appeal as to the other appellants, on the ground that they have not, as required by section 635, R. S. 1881, given notice of the appeal to their co-parties. But this motion, made after the agreement to submit, comes too late and must be overruled. *People's Savings Bank, etc., v. Finney*, 63 Ind. 460; *Field v. Burton*, 71 Ind. 380; *Easter v. Severin*, 78 Ind. 540; *Hendricks v. Frank*, 86 Ind. 278. It is insisted by counsel for the appellees that the rule announced in the foregoing cases should not apply to the present, inasmuch as the agreement to submit was signed before the filing of the transcript. But it was filed with the transcript, and with it becomes a part of the record of the case. It is not shown that the appellees were induced to enter into the agreement for the submission under any mistake, or by reason of any promise of the appellants as to service on their co-parties. No showing is made, in fact, which should relieve the case from the well established rule that an agreement of submission is a waiver in this court of a defect of parties.

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The appellants James Martin and Edward Cochran demurred severally to the complaint. Their demurrers were overruled, and they answered separately. Martin's answer was in two paragraphs; Cochran's in one; and to each of these the appellees' demurrers for want of facts were sustained. Judgment was rendered for the appellees, granting them leave to take out execution upon the judgment mentioned in their complaint. Errors are assigned by the appellants on the decisions of the trial court in overruling their demurrers to the complaint, and in sustaining the appellees' demurrers to their answers.

The appellees are Robert E., J. Wilbur and John C. Orr. Their complaint states, substantially, the following facts: That on September 26th, 1877, John M. Carnahan, as guardian of said Robert E., and also of one Lawrence F. Orr, recovered judgment in the court below against one Franklin Yerkes, the appellants, and others who are named, in the sum of \$694; that the judgment is wholly unpaid and remains in full force; that after its rendition said wards arrived at age, and their guardian, said Carnahan, settled with them in full; that said Lawrence F. afterwards died intestate, leaving surviving him said appellees as his only heirs; that his estate was fully administered and settled; and that the appellees are the owners of said judgment. There was prayer for leave to issue an execution and for general relief.

Carnahan was made a party defendant to answer as to his interest in the judgment. He answered admitting the facts stated in the complaint and consenting for execution to issue in favor of the appellees.

The objection made to the complaint by the appellants is, that facts are not stated showing how the appellees became the owners of the judgment. The averments of the complaint that the judgment was rendered in favor of a person who was the guardian of one of the appellees, and also the guardian of another person, since deceased, whose estate has been settled and of whom the appellees are the only heirs,

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and that the appellees are the owners of the judgment, sufficiently show their title to it to make the complaint good on demurrer. If the appellants desired a more specific statement of the facts upon which the appellees relied for ownership of the judgment, a motion therefor should have been made. Mere uncertainty in a pleading is not reached by demurrer. *Continental Life Ins. Co. v. Houser*, 89 Ind. 258.

Both paragraphs of Martin's answer were substantially the same. The averments in each were to the effect that the judgment referred to was rendered upon a promissory note executed by Franklin Yerkes as principal, and Martin and others as sureties; that after the maturity of the note, Martin gave and served upon Carnahan a written notice forthwith to institute an action upon said note against the makers thereof; that in a suit afterwards commenced, judgment was rendered on said note, on September 26th, 1877, but that Carnahan did not take out execution upon said judgment within a reasonable time thereafter, but delayed taking out such execution until November 17th, 1877. It is further averred that afterwards, in May, 1883, in a proceeding by Martin against Yerkes, it was adjudged by the court below that the former was the surety of the latter in said judgment.

A surety, bound in writing for the payment of money or the performance of any contract, may, when the right of action accrues, require by notice in writing the creditor or obligee forthwith to institute an action upon the contract. And if the creditor or obligee does not within a reasonable time after such notice, bring his action upon such contract and prosecute the same to judgment and execution, the surety will be discharged from all liability. Sections 1210 and 1211, R. S. 1881. Each paragraph of Martin's answer alleged that he was surety on the note on which the judgment was rendered; that he gave the creditor notice as required by the statute; and that the creditor after prosecuting his action to judgment did not take out an execution for fifty-two days thereafter. Many decisions of this court make it obvi-

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ous that the delay in taking out execution after the rendition of the judgment was unreasonable. *Merriman v. Maple*, 2 Blackf. 350; *Reid v. Cox*, 5 Blackf. 312; *Bishop v. Yeazle*, 6 Blackf. 127; *Overturf v. Martin*, 2 Ind. 507; *Craft v. Dodd*, 15 Ind. 380; *Halstead v. Brown*, 17 Ind. 202; *Root v. Dill*, 38 Ind. 169; *Whittlesey v. Heberer*, 48 Ind. 260; *Willson v. Binford*, 54 Ind. 569; *McCoy v. Lockwood*, 71 Ind. 319.

The appellees urge that Carnahan was excused from taking out execution sooner than he did as the question of Martin's suretyship was not judicially determined for several years after the rendition of the judgment. We are of the opinion, however, that this was no excuse for the delay. The fact of the suretyship is averred to have been known to Carnahan, the judgment plaintiff. Sections 1210 and 1211, *supra*, relate to the rights of the surety with respect to the creditor. Sections 1212 and 1213, R. S. 1881, in regard to trying and determining the question of suretyship, relate to the rights of the surety with respect to his principal. A compliance with said section 1212 is not essential to the protection of the surety's rights under said sections 1210 and 1211. Each paragraph of Martin's answer was sufficient, and there was error in sustaining the demurrer to it.

The appellant Edward Cochran, in his answer, also relied upon his being surety upon the note on which the judgment was rendered, and in the delay of Carnahan to take out execution. He did not claim, however, that he gave Carnahan written notice forthwith to institute an action upon the note, but relied upon the notice given by Martin. This notice could not operate in Cochran's favor, and while an unreasonable delay in bringing suit or taking out execution would have discharged Martin from all liability on the note and judgment, it could not have that effect as to Cochran. This precise question was fully discussed, and the point now considered was decided against Cochran, in the recent case of *Cochran v. Orr*, 94 Ind. 433.

The judgment of the court below is affirmed, with costs,

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in favor of the appellees as to the appellant Cochran, and is reversed, at appellees' costs, as to the appellant Martin, with instructions to the court below to overrule the appellees' demurrer to each paragraph of Martin's answer.

Filed June 27, 1884.

No. 11,261.

MALOTT v. GOFF.

MORTGAGE OF INDEMNITY.—Express Agreement to Pay Debt.—Foreclosure.—

—Where an indemnifying mortgage contains an express agreement of the mortgagor to pay the debt therein described, upon his failure to pay when his liability is ascertained and fixed, and the debt is due, the mortgagee may at once, without having paid such debt or any part thereof, maintain an action for the foreclosure of the mortgage and may recover therein, as damages, actual compensation for the total probable loss.

From the Grant Circuit Court.

J. A. Kersey and L. D. Baldwin, for appellant.

I. VanDevanter and J. W. Lacey, for appellee.

HOWK, J.—In this case the only error assigned by the appellant, Malott, the plaintiff below, is the decision of the circuit court in sustaining appellee's demurrer to his complaint.

The material facts stated by the appellant in his complaint are as follows: On the 18th day of February, 1878, one Jesse H. Nelson and his wife conveyed by their deed of that date lot No. 4, in block No. 18, in the town of Marion, in Grant county, to Millicent Malott, then and since the wife of the appellant. On the same day, and in consideration of such conveyance, the appellant and his wife conveyed 58.66 acres of land, particularly described, in Grant county, to said Jesse H. Nelson. At and before the date of these conveyances, said lot No. 4, in the town of Marion, was encumbered by the lien of a certain judgment, which one William White had, at the September term, 1876, of the court below, recovered against

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Jesse H. Nelson, and another for the sum of \$1,201. On the same day the deeds above described were executed, Jesse H. Nelson and his wife mortgaged the afore-mentioned 58.66 acres of land to the appellant, Robert Malott, to indemnify him from any loss he might thereafter sustain on account of the aforesaid judgment, from which an appeal was then pending in this court; and, in such mortgage, the mortgagors expressly agreed to pay the sum of money therein secured, without relief, etc.

This suit was brought by the appellant, the mortgagee, to foreclose such indemnifying mortgage; and, in addition to the facts aforesaid, the appellant stated in his complaint that the aforesaid judgment had been affirmed by this court (*Nelson v. White*, 61 Ind. 139) on the 19th day of September, 1878; that such judgment had then become and since remained due and wholly unpaid, and was a lien upon said lot No. 4, conveyed as aforesaid to the appellant's wife, Millicent Malott; that the said Jesse H. Nelson had wholly failed and refused to pay the said judgment, and was then insolvent; that the mortgage in suit was duly recorded on the 27th day of February, 1878, in the recorder's office of Grant county; and that afterwards, on the 16th day of March, 1880, the appellee, George B. Goff, purchased and became the owner in fee of Jesse H. Nelson's interest in the mortgaged real estate, subject to the lien of the appellant's mortgage thereon. Wherefore, etc.

The mortgage in suit was illy prepared, and the allegations of the complaint, as it appears in the record, are badly confused and disconnected; but we have given, we think, a fair and full statement of the facts constituting the appellant's alleged cause of action. The only question for our decision is this: Do these facts show an existing cause of action, in favor of the appellant, for the foreclosure of his mortgage against the appellee? We are of the opinion that this question must be answered in the affirmative. The case at bar can not be

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distinguished, in principle, from *Guncel v. Cue*, 72 Ind. 34. In that case it was held by this court that where an indemnifying mortgage contains an express agreement of the mortgagors to pay the debt secured, upon their failure to pay such debt when due, the mortgagee may at once, without having first paid the debt, or any part thereof, maintain an action for the foreclosure of the mortgage, and may recover therein, as damages, actual compensation for the total probable loss. The case cited has been approved by this court, upon the point under consideration, in the following more recent cases: *Durham v. Craig*, 79 Ind. 117; *Strong v. Taylor School Tp.*, 79 Ind. 208; *Bodkin v. Merit*, 86 Ind. 560; *Loehr v. Colborn*, 92 Ind. 24. To the same effect, substantially, we also cite the following cases: *Loosemore v. Radford*, 9 M. & W. 657; *Weddle v. Stone*, 12 Ind. 625; *Devol v. McIntosh*, 23 Ind. 529; *South Side, etc., Ass'n v. C. & S. Lumber Co.*, 64 Ind. 560; *Thomas v. Allen*, 1 Hill, 145; *Gilbert v. Wiman*, 1 N. Y. 550; *Wilson v. Stilwell*, 9 Ohio St. 467; *Wright v. Whiting*, 40 Barb. 235.

Our conclusion is that the appellant's complaint in this case stated facts sufficient to constitute a cause of action, and that the demurrer thereto ought to have been overruled.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed June 27, 1884.

 No. 10,095.

 SECOND NATIONAL BANK OF LAFAYETTE ET AL. v. BRADY
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FRAUDULENT CONVEYANCE.—*Agreement of Vendee to Reconvey.*—A conveyance back to the grantor of property conveyed to defraud creditors, pursuant to an agreement made at the time, is not fraudulent or illegal.

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SAME.—*Consideration.*—*Promissory Notes.*—*Promise to Reconvey.*—Where a grantee in a deed executed to defraud creditors reconveys the property solely in consideration of the verbal promise made at the time of the first conveyance, and non-commercial promissory notes are executed at the time of the reconveyance to give color to the transaction, there is no consideration for such notes.

SAME.—*Legality of Consideration.*—*Cases Criticised.*—Notes executed at the time a reconveyance of the land is made by the grantee to the fraudulent grantor, pursuant to the verbal agreement made during the original transaction, are not tainted by the illegality of that transaction. The cases of *Springer v. Drosch*, 32 Ind. 486, *Van Wy v. Clark*, 50 Ind. 259, and *O'Neil v. Chandler*, 42 Ind. 471, criticised.

PROMISSORY NOTE.—*Assignee of Note not Payable in Bank.*—The assignee of a promissory note not payable in bank takes it subject to defences existing before notice of assignment.

From the Superior Court of Tippecanoe County.

R. Jones, F. B. Everett and J. M. LaRue, for appellants.

J. R. Coffroth, T. A. Stuart, A. L. Kumler, G. O. Behm, A. O. Behm and J. A. Stein, for appellees.

ELLIOTT, C. J.—The appellee brought this suit to secure a decree for the cancellation of several notes and a mortgage executed by him. The facts were found by the court and conclusions of law stated. A motion for a new trial was overruled, and we think that the question whether this ruling was right depends entirely upon whether the theory of the law adopted by the court was or was not correct, for there is evidence supporting the finding of facts. The controlling questions in the case are presented by the special finding, and to that we turn. The finding is, substantially, as follows:

“That on the said 18th day of March, 1862, the said plaintiff was (and for several years previous thereto had been) indebted to the Lafayette Branch of the Bank of the State of Indiana in the sum of \$3,437.09, upon a promissory note executed by him to said bank; that at and during said time the said bank was demanding payment of said debt and threatening to collect the same by process of law; that at the date aforesaid the plaintiff was indebted to the defendant Tinkler in the sum of \$701.25, for which amount the said Tinkler

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held the note of B. and J. D. Brady, and the plaintiff also owed said Tinkler several hundred dollars on account; that at the time aforesaid, said plaintiff was also indebted on account of the following mortgage liens upon said real estate so held by him as aforesaid, to wit: Eleanor Wheeler, \$1,000; Philip Ensminger, \$1,250; Coombs, \$1,365; Resor, \$1,080; school fund, \$400; that on said 18th day of March, 1862, the said plaintiff, being unable to pay his said indebtedness to said bank, and having reason to apprehend that said bank would enforce the collection of its debt by process of law, proposed to the defendant Tinkler that the said Tinkler should accept from him a conveyance of his said real estate and hold the title to the same until the plaintiff could be relieved in some way from his financial embarrassment; that said proposition was made by said plaintiff for the purpose of hindering, delaying and defrauding his creditors, and especially for the purpose of hindering, delaying and defrauding the bank in the collection of its said debt; that said Tinkler understood the purpose for which said proposition of Brady was made, and, understanding it, agreed to it, with the understanding that he was to hold the title to said lands until the plaintiff could make a settlement with said bank; that thereupon, to wit, on said 18th day of March, 1862, the said plaintiff, without consideration, and for the special purpose of delaying and defrauding the said bank in the collection of its said debt, voluntarily conveyed said lands to said Tinkler; that at the time of the execution of said conveyance from the plaintiff to said Tinkler, he, the said Tinkler, executed his eight promissory notes in favor of the plaintiff for the sum of \$750 each, payable respectively, on the 1st day of October, in the years 1863, 1864, 1865, 1866, 1867, 1868, 1869 and 1870, and contemporaneously with the execution of said notes the plaintiff executed a written agreement whereby it was stipulated that said Tinkler should not be required to pay either of said notes until the plaintiff should discharge all and singular the then existing liens upon said lands, and that in the event of said

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Tinkler paying any of said liens, such payment should be a credit upon said notes; that none of said eight notes were ever delivered to the plaintiff, but all of them were subsequently destroyed by said Tinkler; that prior to the 14th day of August, 1875, the liens hereinbefore set out were paid and discharged by the plaintiff, except the Coombs lien, which remains unpaid; and I find that the said eight notes executed by Tinkler in favor of the plaintiff were given without consideration; that in the year 1867 the plaintiff and his said cotenant, Jefferson D. Brady, made an amicable partition of said lands so held in common by them, and set apart to each other the respective portions thereof hereinafter referred to; that afterwards, to wit, on the 13th day of October, 1873, in confirmation of said amicable partition, the said Jefferson D. Brady executed a deed conveying to said Tinkler the portions of said lands so held in common; that said Tinkler conveyed the remaining portion of said lands so held in common to said Jefferson D. Brady; that from thence until the 14th day of August, 1875, said Tinkler held the title to said lands in severalty and pursuant to the said proposition made to him on the 18th day of March, 1862; that afterwards, to wit, on the 14th day of August, 1875, the plaintiff having settled his indebtedness to said bank by compromise, by paying said bank in full satisfaction of its claim the sum of \$2,000, requested said Tinkler to reconvey said lands to him, and thereupon said Tinkler, in compliance with said request, voluntarily conveyed to the plaintiff said lands so conveyed to him in severalty by the plaintiff, and also said lands conveyed to him by said Jefferson D. Brady.

“At the time and date of said last named conveyance from Tinkler to the plaintiff, to wit, on the 14th day of August, 1875, the plaintiff executed to said Tinkler the notes and mortgage which are described in the complaint and cross complaint. But said notes and mortgage were executed by the plaintiff, and delivered to said Tinkler, upon an understanding between them that they were so executed and delivered

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for the purpose of maintaining an appearance of good faith in the transaction of March 18th, 1862, and upon the further understanding that Tinkler should deliver them to the plaintiff in a short time. I find that said notes and mortgage sued on were executed by the plaintiff without consideration, and that said notes are not payable in any bank in this State.

"I further find that on the 23d day of March, 1876, the defendant Tinkler, and his brother, Joseph Tinkler, were indebted to the said defendant and cross complainant, the Second National Bank of Lafayette, in a sum exceeding the amount of the notes in suit, partly due and partly to become due shortly thereafter; that on said last day, in partial satisfaction of the indebtedness of himself and his said brother Joseph to said Second National Bank, viz., in satisfaction of so much of said indebtedness as the notes in suit would cover, the defendant Consider Tinkler assigned said mortgage and endorsed said notes in suit to said Second National Bank, neither of said notes or instalments of interest being then due, and said assignment of said notes and mortgage, and other payments made by said defendant Tinkler, were accepted by said Second National Bank in settlement of said indebtedness of said Consider Tinkler and his brother Joseph.

"I further find that at the date of said assignment of said notes and mortgage said Joseph Tinkler was insolvent.

"I further find that at the date of the execution of said notes and mortgage the plaintiff was unmarried, and that he has since intermarried with said defendant Lena L. Brady, one of the defendants to said cross complaint.

"I further find that from the 18th day of March, 1862, until the 14th day of August, 1875, the said plaintiff was in the peaceable and uninterrupted possession of said lands, and received the issues and profits of the same with the knowledge of the defendant Tinkler.

"I further find that in October, 1862, the said Lafayette Branch of the Bank of the State of Indiana recovered a judgment against the plaintiff in the Tippecanoe Circuit Court, on

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account of said indebtedness of said plaintiff to it, in the sum of \$3,546.34, and that said Lafayette Branch of the Bank of the State ceased to exist in the year 1865.

"I further find that the amount of principal and interest upon the first three of said notes, after deducting payments, is \$4,356.43; that on the 14th day of August, 1881, the amount of principal and interest of said fourth note, after deducting payments, will be \$1,450; that on the 14th day of August, 1882, the amount of principal and interest, after deducting payments on said fifth note, will be \$1,550; that on the 14th day of August, 1883, the amount of principal and interest, after deducting payments on said sixth note, will be \$1,650; that on the 14th day of August, 1884, the amount of principal and interest on said seventh note, after deducting payments, will be \$2,768.33.

"I further find that in the said deed of conveyance from said defendant Tinkler to said plaintiff, and in the said mortgage from said plaintiff to said Tinkler, there is a misdescription of one of said tracts of land as stated in said cross complaint.

"I further find that no evidence has been given upon the allegations in said cross complaint as to the lien in favor of said Byron W. Langdon."

Upon the facts, conclusions of law were stated in the following language:

"I find in favor of the plaintiff, Benjamin Brady, and against said defendants, the Second National Bank of Lafayette and Consider Tinkler, and that said plaintiff is entitled to have said notes and mortgage, described in his complaint, cancelled.

"As a further conclusion of law upon the facts so found as aforesaid, I find upon the cross complaint of said cross complainant, the Second National Bank of Lafayette, in favor of the defendants Benjamin Brady, Lena L. Brady and Byron W. Langdon.

"As a further conclusion of law upon the facts so found as aforesaid, I find in favor of the cross complainant, the Sec-

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ond National Bank of Lafayette, against said defendant Consider Tinkler, upon the said cross complaint of said bank, that there is now due to said cross complainant from said Consider Tinkler, on account of the assignment of said mortgage and endorsement of said notes by said Consider Tinkler to said Second National Bank of Lafayette, the sum of \$4,356.43; that there will become due on like account from said Tinkler, to said bank, on the 14th day of August, 1882, the further sum of \$1,550; that there will become due on like account from said Tinkler to said bank, on the 14th day of August, 1883, the further sum of \$1,650; and that there will become due on like account from said Tinkler to said bank, on the 14th day of August, 1884, the further sum of \$2,768.83."

The general rule undoubtedly is that between the parties a fraudulent conveyance of land made with intent to defraud creditors is valid, and that such a conveyance can be annulled only at the suit of a creditor. But in the present instance the notes and mortgage were not executed as part of the original transaction, but were executed a long time afterwards, and in performance of an agreement made at the time the original conveyance was executed. The case assumes quite a different form from that which it would wear, if the notes and mortgage formed part of the original transaction.

The conveyance made by Tinkler to Brady, in 1875, was made something more than thirteen years after the fraudulent conveyance of the land, and was executed pursuant to the agreement made at the time of the execution of the original conveyance, that Tinkler should reconvey the land to Brady. The conveyance made in 1875 was in execution of the former agreement, and not in consideration of the notes and mortgage in suit. The notes and mortgage did not induce the conveyance; that was induced by the promise made thirteen years before. The consideration of the notes and mortgage was not, as the court finds, the conveyance of the land, so that they can not be held to rest upon that consid-

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eration. Assuming, then, that the conveyance was made in execution of the prior agreement and not in consideration of the execution of the notes and mortgage, our search must be for some other consideration. The question to which we come is, was there any other consideration, and if so, what was it?

Tinkler voluntarily reconveyed to Brady in accordance with the agreement made in 1862, and there is, therefore, no necessity for examining or deciding whether Brady could have compelled Tinkler to carry into effect that agreement. It was voluntarily carried into effect, and that ends all question as to whether it could or not have been enforced. We are not required to decide whether the notes and mortgage would have been supported by a consideration, if Tinkler had demanded them as compensation for conveying the land back to Brady, for no such demand was made and the conveyance was for the single purpose of making good the agreement made thirteen years before.

Whatever may have been the rights vested in Tinkler by the conveyance of 1862 they were divested by the conveyance executed to Brady in 1875. This conveyance stripped Tinkler of all interest in the land and of all rights growing out of the original transaction. All claims upon Brady, growing out of that transaction, were extinguished by the voluntary conveyance executed in 1875, re-vesting the land in Brady in accordance with the previous agreement. In *Fargo v. Ladd*, 6 Wis. 106, the question here in hand received consideration, and it was held that where the grantee of property fraudulently conveyed had voluntarily reconveyed to the grantor, in apparent execution of his trust, he can not afterwards make a valid claim to the property, or its proceeds, on the ground of the original fraudulent conveyance.

The validity of the original agreement to reconvey is not a material question, and we need not enquire whether it was or was not void under the statute of frauds, or whether it was or was not void because fraudulent, for, to borrow the language of the case cited, "the complainant, by his own act, di-

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vested himself of a title which he had received in fraud of law; and equity does not seem called to re-invest him." And we add that by this divestiture he extinguished all claims arising out of the original transaction.

There are no facts found from which a consideration of the notes and mortgage can be inferred, and the inference of the court that the notes and mortgage were without consideration is fully warranted. The conclusion is an inferential fact deduced from the evidentiary facts.

The purpose of Brady in executing the notes and mortgage in suit was not a fraudulent one, for the claim of the Bank of the State had been adjusted long before, and all rights of the bank to enforce it had been lost. The purpose of the transaction of 1862 was to hinder and delay creditors, but this was not, as we understand the facts, the purpose of the transaction of 1875. The purpose of Brady was to get back his land, and that of Tinkler was to perform the agreement made by him in 1862. There was not any intention to defraud creditors when the last transaction occurred. There were, indeed, no creditors of the appellee Brady who could be injured by the transaction, so that the question is not embarrassed by any consideration of that character.

There is an important difference between setting aside a conveyance made to defraud creditors at the suit of the fraudulent grantor, and the enforcement of notes or mortgages executed in the course of the fraudulent transaction. The cases of *Garner v. Graves*, 54 Ind. 188, *Edwards v. Haverstick*, 53 Ind. 348, and *Laney v. Laney*, 2 Ind. 196, decide that a fraudulent conveyance can not be avoided by the grantor. *Van Wy v. Clark*, 50 Ind. 259, and *O'Neil v. Chandler*, 42 Ind. 371, following, without investigation, the case of *Springer v. Drosch*, 32 Ind. 486 (2 Am. R. 356), decide that notes and mortgages executed by the fraudulent grantor to his fraudulent vendee may be enforced, while *Welby v. Armstrong*, 21 Ind. 489, decides the question exactly the other way. It seems that *Springer v. Drosch*, *supra*, is opposed to the familiar rule that courts

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will not aid either party to enforce a contract founded in fraud, but will leave them where it found them, and it certainly is in conflict with the great weight of authority. *Nellis v. Clark*, 4 Hill, 424; *Moseley v. Moseley*, 15 N. Y. 334; *Mason v. Baker*, 1 Marsh. 208; *Norris v. Norris*, 9 Dana, 317; *Randall v. Howard*, 2 Black, 585; *Fox v. Gardner*, 21 Wall. 475; *Hamilton v. Scull*, 25 Mo. 165; *McCausland v. Ralston*, 12 Nev. 195; *Miller v. Marckle*, 21 Ill. 152; *Heineman v. Newman*, 55 Ga. 262; S. C., 21 Am. R. 279; *McQuade v. Rosecrans*, 36 Ohio St. 442; *Wearse v. Peirce*, 24 Pick. 140. We are not, however, required to pass upon the question as presented in *Springer v. Drosch*, *supra*, because the notes and mortgage, here the subject of investigation, did not form part of the original fraudulent transaction, but were long afterward executed, and executed concurrently with a voluntary reconveyance of the land in compliance with the terms of an antecedent promise.

It is true, as appellants' counsel argue, that Tinkler might have held the land, or might have insisted upon payment of its value before reconveying, but this he did not choose to do; on the contrary he voluntarily reconveyed as he had originally agreed to do, and did not exact payment or promise of payment. The case is to be decided upon what was actually done, not upon what might have been done.

We think it clear that, as between Tinkler and Brady, there was no consideration for the notes and mortgage, and the question is whether the fact that the Second National Bank received them for an antecedent debt due to it from Tinkler changes the rule. The notes were not payable in bank, and therefore not governed by the law merchant. As they were not protected as commercial instruments, they would be subject to the defence of want of consideration in the hands of the assignee unless the maker has done some act which estops him from making that defence.

The special finding does not directly show that the bank released Consider Tinkler and his brother Joseph from their

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indebtedness; for aught that appears they remained bound. If the finding showed a surrender of the evidences of indebtedness or a change of position, then, doubtless, the bank would be protected as a *bona fide* holder so far as there can be a *bona fide* holder of such notes as these. *Boling v. Howell*, 93 Ind. 329; *Gilchrist v. Gough*, 63 Ind. 576; *Mayer v. Grotendick*, 68 Ind. 1.

Where a non-commercial note is shown to have been given without consideration, and the assignee claims a right to enforce it, upon the ground of estoppel, the burden of showing the facts constituting the estoppel rests on the assignee. *Harbison v. Bank*, 28 Ind. 133; *Zook v. Simonson*, 72 Ind. 83; *Small v. Clewley*, 62 Maine, 155 (16 Am. R. 410); 1 Dan. Neg. Ins., sec. 166.

Where a party has the burden, and the special finding is silent as to a fact essential to his defence or cause of action, it will be deemed against him as to that fact. An essential element in an estoppel is, that the person relying upon it was induced to change position by the acts of the party against whom the estoppel is urged, and here there was, according to the special finding, no change of position.

We will, however, treat the case as though there was a release of the two debtors, Consider and Joseph Tinkler, for the reason that the evidence tends to show that fact. Under this view of the case the appellants must fail, for the appellee Benjamin Brady had done no act estopping himself. We think it clear that the mere execution of a non-commercial note does not estop the maker from pleading want of consideration, and nothing more was done by Brady. We need not inquire what the rule would be if the maker were relying upon his own fraudulent act to escape payment, for here, to repeat what it has been necessary to say many times, the notes were not executed for a fraudulent purpose, because it appears that the debt of the creditor had been paid, and the creditor itself, the Bank of the State, had ceased to exist ten years before the notes were executed.

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Notes such as those here under discussion are taken by an assignee at his own risk, knowing that, by positive law, they are subject to defences existing in favor of the maker before notice of assignment. Our statute positively declares this rule of law, and the parties must take notice of it. The party who executes a note not payable in bank can not be held to estop himself from making a defence, for the law expressly vests in him that right. In view of our statute, it would seem clear that one who takes a note not payable in bank is, in a qualified degree, put upon inquiry, and if he fails to ascertain whether there are any defences he must abide the consequences. Of course, if the defence is one forbidden by law, or is one the maker of the note is estopped to assert, then the assignee's right to enforce the note becomes perfect.

In the case of *Wearse v. Peirce*, *supra*, the court ruled, as the report of the case states, "that although the notes were given to defraud the creditors of the tenant, yet if the jury should be satisfied that they were without consideration, that would be a good defence to the action," and this ruling was sustained on appeal. If this ruling is correct, and it seems plain that it is, then, as against Tinkler, Brady would have a valid defence, and if this defence existed against Tinkler, it must, under our law, be valid against his assignee.

The act of Tinkler in reconveying, and that of Brady in accepting the land under that conveyance, were not fraudulent. A late writer says: "Though a reconveyance can not be enforced, the fraudulent vendee is said, in some of the cases, to be under a high moral and equitable obligation to restore the property. The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfil their obligations of honor and good faith. And until the creditors of the vendee acquire actual liens upon the property they have no legal or equitable claims in respect to it, higher than, or superior to, those of the grantor." Wait Fraud. Conv., section 398. The restoration of the property under the circumstances of this case was not a fraudulent act, and as

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the notes grew out of that transaction the appellee did not, in making his defence of want of consideration, plead his own fraud.

We have not considered the question whether relief by cancellation is proper in such a case as this, for that point is not discussed, no question having been made as to the appropriateness of the remedy sought. We have confined our discussion, as we do our decision, to the points argued, and have not undertaken to decide whether this case does or not belong to the class where a voluntary act will bar a right to relief by decree for cancellation. In doing this we have not done harm to any substantial right of appellants, for, if the bank was not entitled to foreclose the mortgage and enforce the notes, it can make little difference whether they are ordered cancelled or not.

Judgment affirmed.

Filed June 27, 1884.

No. 9205.

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COMPANY ET AL.

PRACTICE.—*Judgment for Failure to Plead.*—Where no rule to reply has been taken, a defendant is not, under the code, entitled to judgment for want of a reply.

MORTGAGE.—*Foreclosure.*—*Counter-Claim.*—*Junior Incumbrance.*—*Judgment.*—In a suit to foreclose a mortgage, making defendant a subsequent mortgagee whose demand is not due, a counter-claim by such defendant, asserting his mortgage, with a view to its adjustment and such a decree as will protect his rights, will resist a demurrer by the mortgagor.

SAME.—*Construction of Mortgage.*—*When Due at Option of Mortgagee.*—*Waiver.*—*Promissory Note.*—A mortgage was given to secure a note for a principal sum, and coupon notes for interest, due semi-annually in succession. The principal note recited that interest thereon was paid by the coupons. The mortgage provided that a failure to pay any coupon at maturity, or taxes on the mortgaged property, should, at the option of the mortgagee, make the mortgage debt due and collectible.

Held, that the commencement of a suit to foreclose for the whole debt was

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| 96 | 510 |
| 128 | 368 |
| 128 | 370 |
| 96 | 510 |
| 131 | 528 |
| 133 | 297 |
| 133 | 667 |
| 96 | 510 |
| 135 | 630 |
| 96 | 510 |
| 142 | 473 |
| 96 | 510 |
| 156 | 391 |
| 96 | 510 |
| 171 | 332 |

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a sufficient exercise of the mortgagee's option, and that notice to the mortgagor of this election, before suit brought, need not be alleged or proved.

Held, also, that the recital in the principal note was not a waiver of the right of option given by the mortgage.

SAME.—*Harmless Error.*—*Counter-Claim.*—*Judgment.*—*Interest.*—*New Trial.*

—*Evidence.*—In a suit to foreclose a mortgage, the mortgagor, junior mortgagees, and one who had purchased the premises at a sale for taxes, were made defendants. The latter filed a counter-claim, asserting a lien superior to those of all the other parties, upon which issues were formed by the mortgagor and the other parties, and this part of the cause was ordered to be tried separately, and a continuance thereof granted; while the other issues, including those upon counter-claims filed by the junior mortgagees, were tried. It did not appear whether any or what disposition had ever been made of the issues thus continued for trial.

Held, that the record did not show any injury to the mortgagor by this proceeding, and, therefore, he could not question it in the Supreme Court.

Held, also, that though the claims of the junior mortgagees were not matured when the counter-claims were filed by the junior mortgagees, yet, having been amended afterwards so as to allege their maturity, a personal judgment for such of them as were due at the time of trial, and a decree of foreclosure for such as were not due, with proper rebate of interest, was not erroneous.

Held, also, that any error in fixing the amount of rebate of interest was not reached by a motion for a new trial.

Held, also, that no question as to the sufficiency of the evidence to support a decree that the mortgaged property was indivisible is presented by an ordinary motion for a new trial of the whole case; but in such case there should be a request for a special inquiry on that subject, and exception to such finding and decree as may be made upon it, so that the question may be made separately.

SAME.—*Receiver.*—*Practice.*—Where a receiver has been properly appointed in a suit for the foreclosure of a mortgage, there is no error in continuing the receivership after final decree of foreclosure, nor is any question concerning it presented by a motion for a new trial.

SAME.—*Rents.*—Pending a suit to foreclose a mortgage, if the mortgaged premises be indivisible, the debtor insolvent, and the property sold for taxes, a junior mortgagee defendant, whose debt is not due, having filed a counter-claim setting up his demand, may, on petition showing the facts, and that the property is less in value than the amount of the incumbrances, have an interlocutory order appointing a receiver to collect rents.

SAME.—*Continuance.*—*Evidence.*—*Affidavit.*—To a petition, pending a cause, for a receiver, no formal answer is authorized, nor is a refusal to con-

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tinue the hearing any error, where it does not appear that the facts can be controverted; nor is any formal pleading proper, and the court may refuse to hear oral evidence, the proper practice requiring affidavits.

SAME.—Appeal.—In such case the statute, R. S. 1881, section 1231, authorizing an appeal from an interlocutory order appointing a receiver, does not preclude a review of the question upon a general appeal after final judgment in the cause.

SAME.—Promissory Notes.—Assignment.—The assignor of a promissory note is not personally liable therefor, where there has been no effort to collect it from the maker and no proof of his insolvency; but if it be one of several notes secured by a mortgage executed to him, a decree of foreclosure against him is proper, in the absence of proof that he has assigned all the notes so secured.

SAME.—Harmless Error.—Demurrer.—A defendant, whose demurrer to a complaint to foreclose a mortgage has been overruled, but against whom no judgment has been rendered, and who is shown by the evidence to have no interest in the property, is not harmed by the error, and can not complain in the Supreme Court.

SUPREME COURT.—Judgment.—Exceptions.—A judgment which is beyond the scope of the complaint can not be questioned in the Supreme Court unless it has been objected to below and the question saved by exception.

From the Superior Court of Marion County.

G. B. Manlove, J. Buchanan, S. M. Shepard and C. Martindale, for appellants.

J. R. Wilson, for appellees.

ZOLLARS, J.—On the 20th day of September, 1876, the Berkshire Life Insurance Company, one of the appellees, filed its complaint in the court below, against James Buchanan and wife, William J. Davis and wife, William H. English, Henry Schnull, Albert E. Fletcher, Joseph M. Tilford and wife, and a number of others, to foreclose a mortgage executed to it by Buchanan and wife, and Davis and wife, on the 29th day of December, 1873. This mortgage was executed to secure a \$15,000 note of even date, due five years after date, with five per cent. attorney fees, and interest at ten per cent. per annum. The note contains this statement: "The interest is paid to maturity by coupon notes hereto attached which, with the principal, are secured by mortgage." Copies of six of these coupon notes, of \$750 each, are filed with the

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complaint. They are all of even date with the principal note and mortgage. Each contains a promise to pay \$750, with five per cent. attorney fees, if suit be instituted, and ten per cent. after maturity. By their terms they were to mature thirty, thirty-six, forty-two, forty-eight, fifty-four and sixty months after date. The principal and coupon notes were executed by James Buchanan and William J. Davis. The mortgage, a copy of which is filed with the complaint, contains an agreement that the mortgagors should pay all legal taxes and assessments against the property; that on default in that regard, the mortgagee might pay such taxes and assessments, and collect the amount, with ten per cent. interest, under the mortgage. The mortgage also contains an express promise to pay the sum secured, without relief, etc., and five per cent. attorney fees in case of suit upon any of the notes or the mortgage. There is a further stipulation as follows: "The mortgagors agree that upon failure to pay any or either of said principal, interest or coupon notes at maturity, or taxes or assessments, etc., as herein provided, then all of said mortgage debt shall, at mortgagee's option, become due and collectible. But the omission of the mortgagee to exercise this option at any time, or times, shall not preclude said mortgagee from the exercise thereof at any subsequent default or defaults of the mortgagors in making payments as aforesaid."

On the 1st day of December, 1876, a substituted amended complaint was filed. After stating the execution of the notes and mortgage, and the recording of the latter on the 5th day of January, 1874, the complaint contains the further averments that the \$750 note, due thirty months after date, is due and unpaid; that the taxes for the year are also due and unpaid, and that according to the terms of the mortgage, on the happening of such defaults, the mortgage should be foreclosed for the whole of the notes evidencing the debt, at the option of the mortgagee, and the mortgagee so elects;

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and that all of the notes thus become and are due. There is the further averment that all of the defendants, except the makers of the mortgage, have, or claim to have, some interest in the mortgaged premises, and that if they have any such interest, the same is junior to the mortgage of the plaintiff, the Insurance Company.

Judgment is asked for \$20,000 against the makers of the notes, the foreclosure of the mortgage against all of the defendants, and the sale of the mortgaged premises, or so much as may be necessary to pay the debt, and for all other proper relief.

William H. English and Henry Schnull each filed an answer and cross complaint. Albert E. Fletcher, Michael Tooley, and the Bank of Commerce and John Wyman, filed cross complaints. Other answers and cross complaints were filed, some of which are not set out in the record, and others of which we need not notice, as no question is made upon them in this court. The answers and cross complaints of English, Fletcher, Schnull, the Bank of Commerce and Wyman, are based upon notes and a mortgage to secure the same, executed to appellant Tilford; the notes being executed by Buchanan and Davis, and the mortgage by them and wives, on the 1st day of January, 1874. A portion of these notes were endorsed by Tilford to these cross complainants. Fletcher held two of them, one for \$3,000, and one for \$1,620, each providing for five per cent. attorney fees in case of suit, and ten per cent. interest after maturity, and to become due on or before the 1st day of January, 1883. English held three of the notes of \$3,000 each, with like provisions as to interest and attorney fees, and to mature respectively, on or before the 1st day of January, 1877, 1878 and 1879. In addition to these, he held three others, one for \$540, one for \$720, and one for \$900, each with like provisions as to interest and attorney fees, and to mature in the order named, on or before the 1st day respectively of January, 1877, 1878 and 1879. Schnull held three of the principal notes of \$3,000, with the

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same provisions for interest and attorney fees, and to mature on or before the 1st day of January, 1881, 1882, and 1884. In addition to these, he held three others, one for \$1,260, one for \$1,440, and one for \$1,800, to mature at the same dates with the \$3,000 notes. The Bank of Commerce and Wyman held two of the notes, one for \$3,000, and one for \$1,080, the latter being for interest on the former, each maturing on or before the 1st day of January, 1880, and with the same provisions for interest and attorney fees. The smaller notes held by English, Schnull, Fletcher, the Bank of Commerce and Wyman, are shown by the mortgage to have been given for the interest on the larger and principal notes. These cross complainants, in their pleadings, admit that their liens are junior to that of the insurance company, but assert that they are superior to all others. Each, except the Bank of Commerce and Wyman, alleges that the mortgaged property is indivisible, without most serious injury and the lessening of their security.

English and Schnull aver in their cross complaints, that the property mortgaged is not sufficient to satisfy the claim of the insurance company and their claims, and that those personally liable are not good for the debts, or any one of them, and that the owners of the property are suffering it to get out of repair, and materially injured. They pray for judgment, a foreclosure of the mortgage, the appointment of a receiver, etc. After various other pleadings by the several parties, the cause, except as to the issues tendered by the cross complaint of Tooley, was tried on the 16th day of June, 1877, and judgments and decrees rendered for the plaintiff and cross complainants. From this judgment, Buchanan and wife, and Tilford and wife, appealed to the general term, and thence to this court. The record will be further stated as we proceed with the examination of the several questions discussed by appellant's counsel.

Buchanan and wife answered the complaint of the insurance company by general denial. Subsequently, Buchanan

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filed three additional paragraphs of answer. The third was payment, and in bar of the whole complaint. He did not procure, or ask for a rule upon the plaintiff to reply to the answers, and no reply was filed. On the 11th day of June, preceding the trial, he moved for judgment in his favor against the plaintiff, on account of its failure to reply. The motion was overruled, and he excepted.

It is strenuously insisted by appellant Buchanan, that the trial court erred in overruling the motion for judgment, and thus deprived him of a clear statutory right. The statute relied upon is as follows: "Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purpose of the action, be taken as true," etc. 2 R. S. 1876, p. 71, section 74; section 383, R. S. 1881.

Another section of the code bearing upon this question is as follows: "Where, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party." 2 R. S. 1876, p. 186, section 372; section 566, R. S. 1881.

Had the plaintiff been called upon to reply, and declined, or had it filed a reply that left the answer of payment uncontroverted, there could be no question about the proper application of these sections of the code, and the error of the court in overruling the motion for judgment.

The almost uniform ruling of this court has been that if a party go to trial without, in some manner, procuring or asking for a reply, he will be regarded as having waived it, and the case will be tried as though the answers were controverted by a general denial. *Preston v. Sandford*, 21 Ind. 156; *Shirts v. Irons*, 28 Ind. 458; *Ringle v. Bicknell*, 32 Ind. 369; *Sutherland v. Venard*, 32 Ind. 483; *Train v. Gridley*, 36 Ind. 241; *Moffit v. Medsker Draining Ass'n*, 48 Ind. 107; *Locke v. Merchants Nat'l Bank*, 66 Ind. 353.

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There is another section of the code which, we think, should be considered in connection with those above set out. It is as follows: "The court shall call the causes in the order they stand on the docket, and shall compel the parties to file their respective pleadings, and answers to interrogatories, at such time as the court shall deem just, in no case allowing unreasonable delay," etc. 2 R. S. 1876, p. 67, section 68; section 400, R. S. 1881.

This section requires, as we understand it, that the court shall direct, by what is known in the practice as a rule, when and by whom pleadings shall be filed. Such orders are made upon the motion of parties desiring pleadings from the adversary. It has accordingly been held that after a party has appeared to the action, he can not be defaulted for want of an answer until after a rule for such answer has been made by the court. *Langdon v. Bullock*, 8 Ind. 341.

To default a party for want of a pleading, without a rule for such pleading first made by the court, would be contrary to all ideas of the practice as entertained by the profession. And to render judgment for the defendant upon his answer, before he has asked for or procured a rule for a reply, would seem equally anomalous. It would certainly be unfair and mischievous in practice. The answer might be filed in the absence of the plaintiff and his counsel, and without notice, rule, or a demand for a reply; judgment might be rendered against him also in his absence. In the case in hearing, we think the court did not err in overruling the motion for judgment on the answers on account of the failure to reply. As we have said, no rule for a reply had been procured or asked for by the party moving for judgment. It is said in argument, that the motion for judgment was a call upon the plaintiff and the court for a reply. If that were so, the complaint should be that the court refused to enter and enforce such a rule. The motion, having been made before any rule was asked for, was equivalent to saying to the court that no reply was wanted, but judgment in its stead. Although the ques-

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tion, in the manner here presented, has not been before this court until now, the cases above cited, we think, clearly establish the rule to be, that before a party is entitled to a judgment for want of a reply, he must have first asked for a rule against the adverse party.

In the case of *Preston v. Sandford, supra*, it is said: "When the defendant had put in his affirmative answers, containing matter of avoidance, he was entitled to his rule for a reply; and, on a failure of the plaintiff to comply with it, he might have craved judgment against him, taking his answers, as admitted, to be true."

The next alleged error discussed by counsel is the overruling of Buchanan's demurrers to the cross complaints of English, Schnull, Fletcher, and the Bank of Commerce and Wyman. The ground of demurrer urged in argument is, that the notes held by these parties were not due when the action was commenced, nor when the cross complaints were first filed. As a matter of fact that is true, as shown by the pleadings. As we have seen from the statement of the case already made, the complaint by the insurance company contains an averment that these cross complainants claimed an interest in the mortgaged premises. This allegation is sufficient to make them proper parties defendants. *Bowen v. Wood*, 35 Ind. 268; *Martin v. Noble*, 29 Ind. 216.

It is well established, also, that junior mortgagees are proper parties defendants in an action to foreclose a senior mortgage. *Proctor v. Baker*, 15 Ind. 178; *Holmes v. Bybee*, 34 Ind. 262; Works Pr., section 145, and cases cited; *Ætna Life Ins. Co. v. Finch*, 84 Ind. 301; Jones Mort., sections 1378, 1394, 1425.

It may be granted, for the present, that at the time the demurrers were filed, the cross complainants were not entitled to personal judgments, but it does not follow that the cross complaints were not sufficient to withstand the demurrers, for want of facts. It is well settled that if a complaint state facts sufficient to authorize any recovery or relief, it will withstand a demurrer. Being proper parties, and having

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been properly brought into court, the junior mortgagees were entitled, at least, to have their rights settled as between themselves, and as against the plaintiff, the makers of the mortgage, and owners of the mortgaged premises, especially as the premises are alleged to be indivisible. Their cross complaints challenged Mr. Buchanan as one of the makers of the mortgage securing the notes held by them, and as the owner of the mortgaged premises, to contest, or admit the validity of that mortgage, and the nature and extent of the lien created thereby. There may be a valid cause of action upon the mortgage in the way of adjusting liens, although an action at law may not be maintainable on the notes, because not due. Jones Mort., section 1215. See, also *Ulrich v. Drischell*, 88 Ind. 354.

We think there was no error in overruling the demurrers. What decree should be finally rendered in favor of these junior mortgagees, we need not stop to inquire, in the consideration of the question raised by the demurrers.

Upon the trial, on the 16th day of June, 1877, the court found that the coupon notes executed to the plaintiff, the Insurance Company, maturing thirty and thirty-six months after date, viz., on the 29th day of June and December, 1876, were due; that by reason of their non-payment, the whole of the mortgaged debt had matured, and that there was then due to the insurance company, of the principal sum, coupon notes, interest and attorney fees, the sum of \$18,118.96. For this amount personal judgment was rendered, the mortgage foreclosed against the makers and the cross complainants, and the mortgaged property ordered sold.

It is insisted by the appellant Buchanan, that the judgment should have been for the amount of the two coupon notes, interest on the same after maturity, and the stipulated five per cent. attorney fees, and for nothing more. This is based upon the theory, that the statement in the principal note in relation to the payment of interest by the coupon notes, constitutes a waiver of the stipulation in the mortgage.

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If it might be said that there was a difference in time, in the execution of the note and mortgage, the mortgage should be regarded as having been executed last, because, upon its face, it purports to be for the security of notes already executed. The notes and mortgage should be regarded as having been executed at the same time, and the stipulation in each construed with reference to the other. Jones Mort., section 1179.

The statement in the principal note, that the interest was paid by the coupon notes, is sufficient to bar a recovery of interest other than as provided in the coupon notes; but we are unable to see how this statement can overthrow the express agreement in the mortgage, that on failure to pay the interest, or coupon notes, at maturity, the whole of the mortgage debt shall become due and collectible.

It is further insisted that the judgment and order of sale for the whole amount of the debt is erroneous, because the insurance company gave no notice of the exercise of the option under the stipulation in the mortgage before bringing suit. The mortgage makes no provision for notice of any kind. The stipulation is that upon failure to pay any or either of the interest or coupon notes, taxes, etc., as provided, "then all of the said mortgage debt shall, at the option of the mortgagee, become due and collectible." This provision is not by way of penalty or forfeiture, but is an agreement between the parties as to the time when the whole debt should become due and collectible. It was thus to become due, not upon notice to the mortgagor or others, but at the option, the choice, of the mortgagee. At what time or in what manner the option should be exercised was not provided for; that was left entirely with the mortgagee. It is one of the cases, we think, in which the institution of proceedings to foreclose the mortgage sufficiently shows the election to treat the whole debt as due and collectible. Jones Mort., sections 1181 and 1182. Such a notice would not have enabled appellants to prevent a judgment for the whole amount, by the payment of the

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coupon interest notes overdue, and delinquent taxes, if any. When the whole amount became due by the failure to pay as agreed upon, it was not in the power of appellants to make it otherwise, except with the consent of the mortgagee. They might have paid the whole amount and thus prevented judgment and foreclosure, and this they might have done after suit was begun. Jones Mort., section 1185.

It may be remarked, in passing, that appellants made no offer to pay, either the whole amount or the interest notes, admitted by them to be overdue.

No objections are urged against the validity of the stipulation in the mortgage, or the amount found by the court to be due the plaintiff, except those above stated. We think they are not well taken. What we have said also disposes of the motion to strike out certain portions of the cross complaints, and the objection to the introduction of the notes and mortgage in evidence.

Michael A. Tooley was made a party defendant to the complaint of the insurance company. He filed a cross complaint, setting up that he had purchased the mortgaged premises at tax sales for city, county and State taxes, and that by such purchases he had a superior lien for \$1,943.69. Buchanan answered this cross complaint, disputing the validity of the tax sales. Before the trial of the other issues, formed by the several pleadings, the court, on motion of the plaintiff, ordered that the issue tendered by, and formed upon, Tooley's cross complaint should be tried separately. To this order Buchanan objected and excepted, and now insists that it was erroneous.

We can not say that the court erred in making the order; nor can we say from the record before us that by such order the rights of Buchanan were at all affected.

The decree foreclosing the mortgage shows that at the time it was rendered the case as to Tooley had not been tried, and was on that day continued. Of that case the record makes no further mention. For aught that appears from the record, Tooley may have dismissed his cross bill, or the case might

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have been tried and his claim defeated. However the facts may be, it is certain that we can not say from the record before us that Buchanan was in any way prejudiced by the separation, and hence need not decide upon the correctness or incorrectness of such separation.

In the findings, which amount to nothing more than a general finding against the defendants, and which may be said to be a part of the final decree for some purposes, the court found, among other things, that the parties personally liable upon the notes to the plaintiff and cross complainants English, Schnull, Fletcher, the Bank of Commerce and Wyman, were wholly insolvent; that the mortgaged property is indivisible and insufficient in value to pay the taxes and mortgage liens; that it had been sold for taxes, and that the amount requisite to redeem the same is \$1,948.75; that the whole of the plaintiff's debt was due; that there was due English from Buchanan and Tilford, on one of the principal and coupon notes held by him, the sum of \$3,877.28. There was a further finding of the several amounts to become due to English, Schnull, Fletcher, the Bank of Commerce and Wyman from Buchanan and Tilford, with the dates when the same would become due, corresponding with the dates of maturity as fixed by the notes. Following this finding is the final decree proper, giving the insurance company a personal judgment for the amount found due, and foreclosing its mortgage against all of the defendants except Mrs. Tilford and Tooley, who are not named. A personal judgment was also given in favor of English against Buchanan and Tilford for the amount so found due, and the mortgage securing the same, and the other notes held by him, Schnull, Fletcher, and the Bank of Commerce and Wyman, was foreclosed against all of the defendants to the cross complaints of these parties, except Tooley.

The mortgaged property was ordered to be sold *in solido*, and the proceeds applied as follows: *First.* To the payment of costs, except a certain portion adjudged against English and Schnull. *Second.* To the payment of the amount found

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due the insurance company. *Third.* To the amount found due English. *Fourth.* To the payment of the amounts to become due on the notes held by the above named cross complainants, with a proper rebate of interest.

It was further ordered that if the amounts due should be paid before sale, the property should not be sold until a further amount became due under the decree, and if the first amount thus to become due should be paid before sale, a further postponement of sale was provided for, and so on, until the last amount should be paid. The receivership was continued until the further order of the court, and the receiver, theretofore appointed, was ordered to pay into court all amounts collected, to be applied upon the judgment in favor of the insurance company.

There is a general bill of exceptions in the record which purports to contain all of the evidence. As set out in the bill, the evidence is wholly documentary. It contains no evidence upon the question of the value or indivisibility of the mortgaged property, or that it had been sold for taxes, or that any is due; nor is there any evidence upon the question of the insolvency of the makers of the notes. It is contended upon the part of Buchanan, that on account of such lack of evidence, and for other reasons, the judgment and decree is erroneous, so far as it gives personal judgment against him in favor of English, forecloses the mortgage securing the notes held by the cross complainants, fixes the amount to become due on such notes, orders the property sold *in solido*, and continues the receivership. He seeks to make these several objections available under the assigned error in the overruling of his motion for a new trial. No objection was made; or exception taken, as to the form or substance of the judgment.

As we have seen, the court foreclosed the Tilford mortgage, and gave a personal judgment in favor of English for the amount due at the date of the decree, although nothing was due him when his cross bill was first filed. We do not

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think the judgment and decree erroneous in this particular. All the parties in interest and the whole subject-matter were before the court, and there seems to be no good reason why the court should not, in the final decree, settle the several conflicting claims, and thus avoid the multiplication of actions and costs. If some of the notes held by the cross complainants had been due when the cross complaints were filed, and others had fallen due before trial and final decree, it would hardly be contended, under the authorities, that these latter should not have been included in the amount found due. Jones Mort., section 1577; *Smalley v. Martin*, 1 Clarke Ch. (N. Y.) 293; *Adams v. Essex*, 1 Bibb, 149; *Manning v. McClurg*, 14 Wis. 350. In the case last cited, a bond and mortgage securing it had been assigned as collateral security. The debt to secure which the assignment was made not being paid, an action was instituted by the assignee to foreclose the mortgage, and the assignor was made a party defendant. When the action was commenced, a part of the mortgage debt was not due, but became due before final decree. The mortgage was foreclosed for the full amount, the property ordered sold to raise the amount due the assignee, and the surplus found to be due the assignor. In the case in hearing, it must be remembered that the cross complainants were involuntarily brought into court. They were brought in by the plaintiff, the insurance company, and challenged to assert their claim, if they had any. They were bound to meet this challenge and set up whatever rights they had, or suffer loss. *Ulrich v. Drischell*, 88 Ind. 354; *Hose v. Alhwein*, 91 Ind. 497.

Aside from these considerations, the record shows that on the 25th day of January, 1877, after the notes held by English, upon which personal judgment was taken, had matured, the cross complaints of English and Schnull were withdrawn and re-filed. As re-filed, these cross complaints contained the averment that said notes were due and unpaid. The relief to which these cross complainants were entitled should

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be measured by the cross complaints as thus re-filed. Doubtless they might have been amended so as to show the maturity of the notes; or supplemental cross complaints might have been filed, showing such maturity. In either case, we know of no reason why English would not have been entitled to a foreclosure of his mortgage, and a personal judgment against Buchanan for the amount so due. Under the statute, he was entitled to have the amounts to become due on deferred notes properly ascertained, with a proper order of sale in case of failure in payment. As has been already shown, Schnull, Fletcher, and the Bank of Commerce and Wyman held notes secured by the same mortgage, executed by and payable to the same party, but maturing later than those held by English. These were assigned by Tilford, the payee. Had all of these notes been held by English, he would have been entitled to a like finding and order as to each. And while the holders of these deferred notes would be regarded as separate mortgagees for some purposes, yet in this action we think they were entitled to the same relief as if the notes had been held by English. For the reasons stated, we are of the opinion that under the pleadings and upon the evidence, no error was committed in the rendition of a personal judgment against Buchanan in favor of English and the foreclosure of the Tilford mortgage.

It is insisted that the court erred in fixing the proper rebate of interest, if the amount to become due on the deferred notes should be paid before the date of maturity. This is an objection to the form and substance of the decree, and was not raised by the motion for a new trial; and as no objection was made or exception saved to the decree, nor any motion made to modify it, the question is not before us for decision. *Bayless v. Glenn*, 72 Ind. 5; *Trentman v. Wiley*, 85 Ind. 33; *Forgey v. First Nat'l Bank, etc.*, 66 Ind. 123; *Beeson v. Howard*, 44 Ind. 413; *Higgins v. Kendall*, 73 Ind. 522; *Powers v. Johnson*, 86 Ind. 298; *Hancock v. Heaton*, 53 Ind. 111.

The statute in force at the date of the decree provided that

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in cases where several notes were secured by a mortgage, some of which were not due, the court, after final judgment, should ascertain whether the mortgaged premises could be sold in parcels, and if so, order it to be so sold. 2 R. S. 1876, p. 264. Under this statute it has been held that the court may hear the evidence upon the question of the indivisibility of the property after the final judgment, and mould its decree accordingly. *Hannah v. Dorrell*, 73 Ind. 465.

It would seem from this, very plainly, that the question of the divisibility of the property is not so connected with the trial of the main case as that an error in the decree upon that question would be cause for a new trial. In some of the earlier cases, it was held that it should appear of record that the court made the proper inquiry and passed upon the question of divisibility, and that if it did not so appear the judgment would be reversed. In the later, and, we think, better considered case of *Thompson v. Davis*, 29 Ind. 264, it was held that an omission to make the inquiry and order, in a case where the parties appear and make no motion, nor take any exception to the form of the decree, is not such an error as will authorize a reversal of the judgment; that if the defendant ask for such an inquiry, and it be denied, the error will be corrected by this court, not by a reversal of the judgment, but by remanding the cause, with directions to make the inquiry and order.

In the case in hearing, it is inferable from the preliminary finding, that such an inquiry was made during the trial of the main case, but there is no evidence in the record verifying the inference. The record does not show a request for such an inquiry, or any objection or exception to the decree ordering the property sold *in solido*. For this reason appellants are not in a position to ask a reversal on this portion of the decree.

It is insisted further, that the court erred in continuing the receivership, the bill purporting to contain the evidence showing no evidence authorizing it.

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If this question is before us for decision, it must be determined by the legality and validity of the appointment of a receiver in December, preceding the final decree. The final decree upon the subject is as follows: "And as to the receivership heretofore created by order of this court, it is ordered and decreed by this court that the same shall be continued until the further order of this court," etc. Following this is a direction to the receiver, theretofore appointed.

While the question of appointing a receiver was within the issues made by the pleading, it is very evident that no such issue was tried upon the final hearing, and that no receiver was appointed by the final decree. There is simply an order extending the former appointment, based, evidently, upon the facts before the court when such appointment was made. In the motion for a new trial, the continuance of the receivership was assigned as one of the reasons, but no objection was made, nor exception taken to the decree. Such being the case, it may well be said that no question was properly saved as to the last order. But aside from this, if the original appointment was properly made, no valid objection can be urged against the extension. For this reason, we have delayed the consideration of the appointment, although first discussed by counsel.

On the 27th day of November, 1876, after the original cross complaints were filed, the plaintiff, the Insurance Company, and English, Schnull and Fletcher, filed a verified petition for the appointment of a receiver, etc. On the 30th day of the same month, notice of the petition was served upon Buchanan, who had become the sole owner of the property, notifying him that the application would be heard on the 1st day of December. On the 2d day of December he appeared and upon affidavits moved for a continuance of the hearing. This motion was overruled and he excepted. He then moved for leave to file an answer to the petition, which was denied him, and he again excepted. Following this, he asked leave to call witnesses to negative the state-

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ments in the petition, which was also denied him, and he excepted. The court thereupon, without further evidence than that contained in the petition and affidavits, appointed a receiver to take charge of the property, collect the rents and pay them into court, subject to the orders of the court, and report his proceedings for further directions. To this order Buchanan objected and excepted. The receiver qualified by proper oath and bond. On the 19th day of February, 1877, the receiver first appointed having died, the court without notice appointed another in his stead. On the 20th day of March following, Buchanan filed a written motion to set aside and vacate the orders of December 2d and February 19th, *supra*. This motion was overruled and he excepted. As we have seen, the main case was tried on the 16th day of June, 1877, and the motion for a new trial was filed on the 21st of that month. In this motion the rulings of the court in refusing the continuance, and appointing the receiver, were assigned as causes for a new trial. On appeal to the general term, the orders of December and February, appointing the receiver, and the overruling of the motion for a new trial, were separately assigned as error. We think that the assignment on the overruling of the motion for a new trial did not, but that the other assignments did present, for decision, the rulings of the court in the appointment of the receiver, and all questions connected therewith, and that on proper assignments the questions are before us for decision.

We are here met by the argument of counsel for appellees, that as the orders were not appealed from within ten days, there is nothing before us for decision in relation thereto; that the general appeal does not bring up those questions. This argument is based upon former decisions of this court, claimed to be in point, and upon the act of 1875, 2 R. S. 1876, p. 115; section 1231, R. S. 1881. This act provides that in all cases in which a receiver shall be appointed or refused, the party aggrieved by such appointment or refusal may, within ten days thereafter, appeal from the de-

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cision of the court to the Supreme Court, without awaiting the final determination of such case, and that upon the filing of the proper bond, the authority of a receiver so appointed shall be suspended until the final determination of such appeal.

Under a provision of the code of 1852, which, with some modification, has been carried into the revision of 1881, appeals were allowed from certain interlocutory orders. 2 R. S. 1876, p. 245; sections 646, 647, R. S. 1881. Under this provision it has been frequently held that an appeal will not lie from an interlocutory order appointing a receiver. These are the authorities relied upon by appellees. They cite *Wood v. Brewer*, 9 Ind. 86; *Fuller v. Adams*, 12 Ind. 559; *Brinkman v. Ritzinger*, 82 Ind. 358; Buskirk Pr. 36. Judge Buskirk announces the general doctrine of the cases, that an appeal will not lie from an order appointing a receiver, and states the reasons: *First*. Because the order is not a final judgment within the meaning of section 550 of the code; and, *Second*. It is not embraced by sections 576 and 577 of the code. In each of the above cases, except the last, the appeal was attempted from such an interlocutory order without, and separate from, an appeal of the main case; and it was held in consonance with the doctrine announced by Judge Buskirk, that such an appeal would not lie. The last case cited decides nothing upon the point, but recognizes the doctrine of the other cases. The same doctrine has been announced in other cases not cited by counsel.

Under these decisions, however erroneous the action of the court might be in appointing or refusing to appoint a receiver, there was no relief by appeal until, at least, the decision of the main case in this court. The result doubtless was that in many instances parties were compelled to suffer loss for want of a speedy appeal; and, doubtless, it was for this reason that the act of 1875 was passed, authorizing an appeal from such interlocutory orders, as in other cases provided by the code. In either case, there is a limit fixed within which the

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appeal shall be taken. If an appeal is taken from these interlocutory orders, *as such*, clearly it must be within the limit of the time fixed; or if taken from such an order made after the decision of the main case, but while that case is yet in any manner pending, it must be within the limited time. But does it follow from this that if no appeal shall be taken until the appeal of the main case, the action of the court in appointing or refusing to appoint a receiver may not be examined and corrected? We think not. If the sections of the code of 1852, *supra*, had not been enacted, there would have been no appeal from the interlocutory orders named before the appeal of the main case, or separate from that case; but it does not follow that in such appeal such orders might not have been reviewed and pronounced correct or erroneous. And so in the case of interlocutory orders in relation to receivers; without the act of 1875, there was no appeal separate and apart from the main case, but it does not follow that on appeal of that case, the action of the court in relation to the receiver may not be reviewed; it has never been so decided nor intimated in any case in this court that we have been able to find.

An appeal will not lie from the interlocutory order for partition and the appointment of commissioners, but without doubt, upon the appeal from the final judgment, the order for partition would be before this court for consideration. We grant that between such a case and the one in hearing the analogy is not perfect, but it is sufficient, we think, to make the practice in one, authority in the other; indeed, the act of 1875, providing for a separate appeal from the interlocutory order appointing or refusing a receiver, seems to recognize the fact that without such appeal the question would be before this court on the appeal of the main case. The language of the act is, that the appeal may be taken "without awaiting the final determination of such case." In the adoption of the position contended for by appellee, it might result that the main

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case would be reversed, and the receiver left in control of the property.

Having reached the conclusion that we must, upon this appeal, decide upon the validity of the appointment of the receiver, we next dispose of a general objection urged by appellant Buchanan, with much earnestness and force. He contends that by reason of the act of 1861, in relation to the redemption of real estate, a receiver could not be appointed to collect the rents, either before or after the sale, and during the year of redemption. This objection has recently been decided adversely to the position of appellant, and we content ourselves with a citation of the cases. *Connelly v. Dickson*, 76 Ind. 440; *Travellers Ins. Co. v. Brouse*, 83 Ind. 62. As distinguishing these cases and fixing the rule under the act of 1879, see *Sheeks v. Klotz*, 84 Ind. 471.

The material statements in the petition, asking for the appointment of the receiver, are, that there was due to the insurance company \$16,000, and to the cross complainants \$23,000; that the mortgaged property was not worth over \$25,000; could not be sold in parcels; was occupied by tenants; had been sold for taxes in the preceding February; that it would require \$1,948.78 to redeem from the sale; that another instalment of taxes would be due in December, and that Tooley, the purchaser at tax sales, would have the right to, and proposed paying the instalment; and further, that those liable upon the notes were wholly insolvent. The prayer is for the appointment of a receiver to forthwith take charge of the property, collect the rents, pay the taxes, and the residue into court, etc.

We are of the opinion that the facts stated in the petition were clearly sufficient to authorize the appointment of the receiver. If the property had been sold for taxes, and was not worth over the amount stated, it was insufficient to pay the tax and mortgage liens; and if it could not be sold in parcels, and those liable for the debts were insolvent, the cross complainants had the undoubted right, although the notes

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held by them were not due, to have a receiver appointed to collect the rents from the tenants, that they might be applied in payment of the liens. 2 R. S. 1876, p. 115; *Brinkman v. Ritzinger*, 82 Ind. 358; High Rec., section 675; Thomas Mort. 302; *Quincy v. Cheeseman*, 4 Sand. Ch. 405; Jones Mort., section 1530.

It is true the mortgage to the insurance company provided that it might pay the taxes and collect the amount back under the mortgage, but it was not bound to do so, and besides, as we have seen, the debt to the company had become due by a failure to pay the notes.

Did the court err in refusing a continuance, the filing of an answer, the hearing of oral testimony, and in the appointment of a receiver? On the second day after receiving the notice of the petition, Buchanan filed two affidavits, as he states, for the purpose of procuring a continuance. In the first, after stating the length of the notice, he states that by reason of his wife's sickness he had been unable to prepare his defence as it should be. The closing portion is as follows: "The defendant's full defence will consist in a full showing as to what has been done with the rents of the said mortgaged premises, the value of the improvements made," etc.

In a second affidavit, filed at the same time, the material statements are, that he had had possession of the premises for three years, during which time he had collected \$8,500; that during the last year the tenants had been unable to pay in money, and he had been compelled to receive the rents in trade; that the whole amount so collected, and enough more to make a total of \$12,040, had been expended in the payment of taxes, making repairs upon the property, and the payment of previous notes due to the plaintiff and cross complainants; that the taxes really due, aside from the penalty after sale, were not over \$1,000; that he was preparing to contest the validity of the sale and pay the amount actually due before the expiration of the time in which payment might be made; that but for the necessary repairs, and the failure to

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collect all of the rents in money, he would have paid the taxes when due.

This affidavit seems to contain the full defence mentioned in the first, viz., the amount of rents collected and the value of the improvements made. There was no contradiction of the statements contained in this affidavit, and hence it would seem that a continuance was unnecessary in order that affidavits upon that point might be multiplied.

It is not stated in either affidavit that it could or would be shown, that the property had not been sold for taxes,—that was admitted; nor is it stated therein that the property could be sold in parcels, that the plaintiff's debt was not due, nor that the property was of sufficient value to pay the liens upon it. The fact that the rents had been honestly collected and expended upon the property, and in reducing the mortgage debts, was not sufficient to defeat the appointment of a receiver, the other facts existing as stated in the petition. To entitle Buchanan to a continuance, or defeat the appointment of a receiver, the defence, as made and prepared, should have been broad enough to meet all of the material statements in the petition.

We can not say that the court erred in refusing to allow the answer to be filed, for the reason that the proposed answer is not in the record; indeed, for all practical purposes, the affidavits served as answers and constituted the defence to the petition. The statute does not provide for an answer, strictly speaking, in such cases. The correct practice is to meet such an application by affidavits, and not by answer and oral proofs. No motion was made to set aside the notice as insufficient, and hence no question is before us in relation to it. We may remark, too, that the parties were warned by the cross complaints that a receiver was asked for. Upon the record before us we can not say that there was available error in the appointment of the receiver; and if there were such error, it would result only in a reversal of the judgment in that particular, and would not affect the foreclosure proceedings in

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other respects. This appointment having been properly made, so far as shown by the record, the whole matter was in the hands of the court, and, upon the death of the receiver so appointed, it had the authority to appoint a successor without further notice.

We have, with much care, examined all the material points urged for a reversal, on the part of the appellants Buchanans, and finding no error in the record which would justify a reversal, the judgment as to them is affirmed, with costs.

The personal judgment against appellant Joseph M. Tilford must be reversed. One of the notes upon which that judgment was taken was not payable at bank, and there was no evidence upon the trial of any effort to collect from the makers by suit or otherwise; nor was there any evidence of the insolvency of such makers. So far as there is a foreclosure against him, the judgment is affirmed with costs. He is shown to have been a mortgagee. Some of the notes secured by his mortgage he assigned to certain of the cross complainants. The court had the right to presume that he was the holder and owner of the others, the contrary not being shown.

As to Mary A. Tilford, there is not such error in the record as would justify the interference of this court. The decree in favor of the plaintiff is in no sense a foreclosure against her. It is very doubtful whether she is included within the decree in favor of the cross complainants. Such a decree would be beyond the scope of the cross complaints, and hence, in order to preserve any question upon it, she should have objected and excepted to the decree, or made a motion to modify it, neither of which she did. Technically, her demurrers to the cross complaints of English and Schnull should have been sustained, but as the evidence shows that she had no interest in the mortgaged property, and as she claims none, and as no judgment was taken against her for costs, the technical error in overruling the demurrers is entirely harmless. So far, therefore, as there is any judgment against her, it is affirmed.

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ON PETITION FOR A REHEARING.

ZOLLARS, J.—It is insisted, in very strong and emphatic language, that the portion of the opinion holding that no notice to appellant, prior to the institution of the action, was necessary, was not well considered. It is hardly necessary to say that the case was decided after a very careful and laborious consideration and examination by the court. It by no means follows that because a question may not be elaborated at great length, with a copious citation of authorities, it has not been well considered. The Wisconsin court sustains the contention of appellant, that notice of the exercise of the option should precede the bringing of the action. This is the only authority appellant has been able to cite. And while we have a very high regard for that court, we think that the doctrine held by it upon this point is against the weight of authority, and is not sustained by sufficient reason. In support of his text, Mr. Jones cites *Harper v. Ely*, 56 Ill. 179; *Princeton Loan and Trust Co. v. Munson*, 60 Ill. 371; *Cundiff v. Brokaw*, 7 Bradwell (Ill.) 147; *Johnson v. Van Velsor*, 43 Mich. 208. *Johnson v. Van Velsor*, *supra*, was an action to foreclose a mortgage, as stated by the court: "Both bond and mortgage contained the common interest clause giving the mortgagee an option to consider the whole due in case of a continuing default for thirty days," etc. A bill filed to foreclose the mortgage charged that a considerable amount of interest had accrued and fallen due, and had remained due and unpaid for more than thirty days, and that pursuant to the provisions of the mortgage, the plaintiff elected to consider the whole amount due and payable, and so declared. It was claimed on the part of the defendants, that there had been no valid election to cause the whole amount to be immediately due and payable, because there had been no notice of such election before suit. The court did not regard the point as of practical importance in the case, but said: "According to the weight of authority a declaration in the bill

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itself is sufficient, and formal notice of an election prior to the suit is unnecessary, and as we have seen, the bill contained an explicit declaration."

Gundiff v. Brokaw, supra, was an action to foreclose a mortgage. The condition in the mortgage was, that if any part or instalment of the interest should not be paid within six months after the same became due, then, and in that case, the whole of the note secured by the mortgage, both principal and interest then due, should, at the option of the mortgagee, become immediately due and payable, and the mortgage might be at once foreclosed. It was insisted by the defendant that the action could not be maintained, because it was not shown that notice had been given before the bill was filed that the mortgagee had elected to declare the whole sum due for the non-payment of interest. The court said: "This objection we think not tenable. The mortgage required no such notice to be given. The mortgagor and those holding under him were bound to know that the mortgagee had reserved the right in the mortgage at his option to treat the principal as due, if default was made for over six months in the payment of interest, and that such a contingency was liable to occur at any time when default was made in payment for the length of time mentioned in the mortgage. If the mortgagor wished personal notice as a condition precedent to the commencement of a suit, he should have provided for it in the mortgage. On the contrary, the mortgage provides that if default is made, the mortgage may be at once foreclosed. To require such a notice would be to add a condition to the mortgage not contained in it, and this we are not at liberty to do."

This case covers fully the case before us. The conditions in the mortgages are precisely the same so far as relates to the option. The provision in the mortgage in the case *supra*, in relation to the foreclosure of the mortgage, makes no difference. If, in order that the whole amount might become due, the option should be exercised, it was also necessary to a foreclosure that the option should be exercised. The foreclosure for

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the whole amount was dependent upon the whole amount having first become due.

In the case of *Harper v. Ely*, *supra*, it was stipulated in the bond that upon default of payment of interest, etc., the principal sum, at the option of the obligee, should become due. The obligee entered into possession of the real estate, and sold it under a power in the mortgage. It was held that it was not necessary to declare the option prior to the sale. The case is not in all respects like the one before us, but lends support to our ruling. The same may be said of the case of *Princeton Loan and Trust Co. v. Munson*, *supra*.

The case of *Howard v. Farley*, 3 Robt. (N. Y.) 599, seems to have been an action upon a bond, with conditions similar to those in the mortgage in suit. The court said: "The plaintiff does not aver, in her complaint, that she elected to deem the principal due by reason of the non-payment of the interest. * * * If an election had been averred in the complaint, that the principal was due by reason of her option so to make it due, then the facts averred would have entitled her to recover the whole amount secured by the condition of the bond, and interest thereon." The fair implication from this is, that such an averment is sufficient without an averment of notice to the obligor of the exercise of such option.

The condition in the mortgage involved in the case of *Hunt v. Keech*, 3 Abb. Pr. 204, was the same in substance as the condition in the mortgage in suit. In that case the court said: "The commencement of this suit is a sufficient notice of the determination that the plaintiff intends to treat the whole sum as due."

The case of *Young v. McLean*, 63 N. C. 576, is analogous in principle. That action was upon a bond in which the obligor promised to pay at a stated time \$180, payable in currency, or in gold at the rate of \$145 in currency for \$100 in gold, at the option of the holder of the note. The defendants demurred, because the plaintiffs did not aver in the declaration that the defendants had been notified of the option.

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After speaking of cases of conditions precedent, the court said: "But shall the defendants be allowed to say that the terms, which they submitted to, and which were intended for the benefit of the plaintiff, shall operate as a condition precedent and defeat that intention; and that, as the plaintiff did not make known his election before the bond fell due, or at all events, before suit brought, he now has no remedy? It is the debtor's duty to seek the creditor, but this construction would shift the burden from the debtor to the creditor, and make what was intended as a benefit, operate as a hardship upon the creditor."

In the case of *Princeton Loan and Trust Co. v. Munson*, *supra*, it was said, speaking of an option clause in a trust deed: "To require a personal notice to the debtor, who, at the time, might be in distant or unknown parts, might create a very inconvenient delay in the collection of a claim evidently intended by the parties to be speedy; and the creditor might well have refused to accept a security trammelled with such a condition. However proper the giving of personal notice * * of an exercise of the option to make the whole indebtedness due, might have been, we could not hold it to be a condition precedent, to be complied with, in order to a valid exercise of the power of sale."

We can not extend this case for a further citation of authorities, nor do we think it necessary, as those cited fully sustain our conclusion. As we said in the principal opinion, the mortgage contains no stipulation for notice of the exercise of the option. Such a notice might have been contracted for, and made a condition precedent, but it was not. Appellant was bound to know that by his defaults the obligee had the right to regard and treat the whole sum as due and collectible, and that nothing was required of him except the exercise of his own will. Upon making default, it was the duty of appellant to seek the creditor. It clearly was not the duty of the creditor to seek him and notify him of the results of his own laches. Such contracts as that contained in the mortgage may be hard

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upon debtors, and in some cases they may be the results of the necessities of the debtor, but these considerations can not be allowed to turn aside fixed principles of the law. We have no authority to make contracts for parties, nor modify those made. Our duty is a plain one, to enforce contracts as made, when they come before us. We have re-examined the other questions discussed in appellant's brief upon his petition for a rehearing, and are unable to reach conclusions different from those stated in the principal opinion. It would not be profitable to extend the case by a re-statement, or by a fuller statement of the grounds upon which those conclusions are based. If we had doubts about the correctness of the conclusions reached, we should very readily grant a rehearing. We are not satisfied that a rehearing should be granted, and hence the petition is overruled.

Filed June 27, 1884.

No. 11,157.

THE STATE, EX REL. LOWRY, *v.* DAVIS ET AL.

OFFICIAL BOND.—*County Recorder.*—*Statute Construed.*—The official bond of a county recorder, given pursuant to section 5929, is binding upon the principal and his sureties therein, under the provisions of section 5528, R. S. 1881, for the faithful discharge of all duties required of such officer by any law, then or subsequently in force, for the use of any person injured by any breach of the condition thereof.

WARRANTY DEED.—*Grantee's Assumption of Encumbrance.*—*Personal Debt of Grantee.*—*Grantor, Grantee's Surety.*—Where the grantee in a warranty deed, containing his agreement to assume and pay the sum of five hundred dollars, as secured by mortgage given by the grantor on the land conveyed to a certain named person, accepts such deed, then, as between the grantee and the grantor, the sum of five hundred dollars, as a part of the mortgage debt, although evidenced by the grantor's notes, becomes the personal debt of the grantee, and the land conveyed to the grantee, notwithstanding the warranty in the grantor's deed, becomes and is bound for the payment of such debt.

RECORD OF DEED.—*Mistake in Record as to Amount of Grantee's Assumption of Encumbrance.*—*Liability of Recorder.*—*Notice.*—The record of any instrument, entitled to be recorded, is only notice of the existence and

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The State, *ex rel.* Lowry, v. Davis *et al.*

record of such instrument and of the contents, *not* of the instrument itself, but *only* of such record. Where, therefore, a deed containing the grantee's agreement to assume and pay the sum of five hundred dollars as a part of the mortgage debt on the land conveyed, by the mistake of the recorder, is so recorded as to show the grantee's assumption of only two hundred dollars of such mortgage debt, the recorder and his sureties are liable, upon his official bond, for the damages sustained by the grantor in such deed by reason of such mistake.

From the Madison Circuit Court.

J. W. Sansberry, M. A. Chipman and J. W. Sansberry, Jr.,
for appellant.

C. L. Henry and H. C. Ryan, for appellees.

Howk, C. J.—In this case, the joint demurrers of the appellees were sustained by the court to each paragraph of the relator's complaint, for the alleged want of sufficient facts therein to constitute a cause of action. The relator excepted to each of these rulings, and, declining to amend or plead further, judgment was rendered against him for appellee's costs. From this judgment he has appealed to this court and has here assigned, as errors, the decisions of the circuit court in sustaining appellees' demurrers to each paragraph of his complaint.

The relator's complaint contained two paragraphs, in each of which he declared upon the official bond of the appellee, Albert C. Davis, as the recorder of Madison county, against him and the other appellees as his sureties therein. In the first paragraph of his complaint, the relator alleged that at the general election held in Madison county, in October, 1878, the appellee Davis was duly and legally elected recorder of such county, for the term of four years from and after the day of November, 1878, and was qualified according to law and entered upon the discharge of his official duties as such recorder; that, on the day last named, he and the other appellees, as his sureties, executed the bond in suit in the penal sum of \$2,000, payable to the State of Indiana and conditioned, as required by law, that if he, Albert C. Davis, should honestly and faithfully discharge the duties of his office, as

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such recorder, according to law, then the bond was to be null and void, otherwise to be and remain in full force; and that such bond was duly approved by the board of commissioners of such county, and, with his official oath endorsed thereon, was filed by appellee Davis, in the clerk's office of Madison county.

And the relator averred that the appellee Davis did not faithfully discharge his duties as such recorder, according to law, in this, that on the 18th day of March, 1880, the relator and his wife executed to one Nathan Lowry their warranty deed of certain real estate, in Madison county, for the sum of \$3,600, and that it was stipulated in such deed, "said grantee agreeing to assume and pay the sum of \$500 as secured by mortgage given by this grantor on said land to one Jackson Brunt of Madison county, Indiana;" which mortgage was given to secure \$3,300, owing by relator to said Brunt, which debt was evidenced by his promissory notes payable at different times, as shown and stated in said mortgage; whereby said grantee became liable for said sum and said land also liable therefor, and thereby giving notice and knowledge to subsequent purchasers that there was due, upon the purchase-money therefor, the sum of \$500; and that on the 19th day of March, 1880, the said deed having been duly acknowledged, according to law, to entitle it to be recorded, was presented to, left with and received by the appellee Davis, as such recorder, at nine o'clock A. M. of the last named day, and was by him, as such recorder, recorded in deed-book No. 55, on page 533, of the records of Madison county; but that by mistake, oversight, negligence, carelessness and omission of duty of appellee Davis, as such recorder, such deed was recorded as stating that "said grantee agreeing to assume and pay the sum of \$200, as secured by mortgage given by this grantor on said land to one Jackson Brunt of Madison county, Indiana;" that said lands were purchased by and became the property of persons who had no knowledge of such mistake and oversight, and said Nathan Lowry became notoriously

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insolvent and worthless, and subsequently died insolvent, and his estate was worthless; that said notes became due, and, to avoid a suit and judgment against him thereon, after their maturity the relator was compelled to, and did, pay all said notes and interest thereon, including said \$500 and accrued interest, by reason of such negligence, carelessness and omission of duty of appellee Davis, as such recorder; which sum was due from the appellees and wholly unpaid; and that the appellees had wholly failed and refused to pay the same, or any part thereof, although often requested so to do. Wherefore, etc.

In the second paragraph of complaint, substantially the same breach of the bond in suit is alleged by the relator, but in somewhat different language, as in the first paragraph.

The bond in suit was given under and pursuant to the provisions of section 5929, R. S. 1881, in force since May 6th, 1853, which simply requires that the recorder of each county "shall give bond in the penal sum of two thousand dollars." The act, in which this section is found, was approved May 31st, 1852. Subsequently, however, on June 9th, 1852, an act passed by the same General Assembly was approved, "touching official bonds and oaths." In section 10 of this latter act, section 5528, R. S. 1881, also in force since May 6th, 1853, it is provided as follows: "All official bonds shall be payable to the State of Indiana; and every such bond shall be obligatory to such State upon the principal and sureties, for the faithful discharge of all duties required of such officer by any law, then or subsequently in force, for the use of any person injured by any breach of the condition thereof." In *Davis v. State, ex rel.*, 44 Ind. 38, in speaking of this latter section of the statute, it was well said: "In legal contemplation, the above section is incorporated into and composes a part of every official bond and is as much binding upon the officer and his sureties as if the provisions of such section were actually copied into the bond."

When it appears, as it does in this case, that the recorder

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of any county in recording any instrument entitled to record, containing the words (*not* figures) "five hundred dollars," has so recorded the same that such words are entered as "two hundred dollars" in the record of such instrument, it can not be said that such recorder has faithfully discharged the duties required of him by law, in so recording such instrument, within the meaning of the statute or of the condition of his bond. For such a mistake in the record of any instrument entitled to record, it must be that the recorder and his sureties are liable in damages upon his official bond for the use of any person injured by such breach of the condition thereof. *Gilchrist v. Gough*, 63 Ind. 576.

But it is claimed by appellees' counsel that the court did not err in sustaining the demurrers to each paragraph of complaint, because, they say, it affirmatively appears in each paragraph that, as the result of the recorder's mistake, the relator was simply required to pay his own debt evidenced by his own notes, and that such payment so made can afford him no sufficient ground for claiming that he had sustained damages by reason of the recorder's breach of the condition of his official bond. This is the purport and gist of the argument of counsel, as we understand them, although we have expressed it in somewhat different language from that used by counsel. The argument is unsound and, as we think, fallacious. When Nathan Lowry, the grantee named in the relator's deed, accepted such deed with the statement therein of his agreement "to assume and pay the sum of five hundred dollars as secured by mortgage given by the grantor on said land to one Jackson Brunt, of Madison county," then, as between such grantee and the relator, the said sum of \$500 as a part of said mortgage debt, although evidenced by the relator's notes, became the personal debt of the grantee to the relator, and the land conveyed to the grantee by the relator, notwithstanding the warranty in the latter's deed, became and was bound as a security for the payment of such debt. *Josseylyn v. Edwards*, 57 Ind. 212; *Hoffman v. Risk*, 58 Ind. 113;

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Gerber v. Sharp, 72 Ind. 553; *Davis v. Hardy*, 76 Ind. 272; *Sidener v. Pavey*, 77 Ind. 241.

This is so beyond all doubt, while the title to and ownership of the land remained in the relator's immediate grantee, Nathan Lowry, and if the relator's deed to such grantee had been correctly entered of record by the appellee Davis, as such recorder, the land conveyed would have been bound in the hands of any subsequent grantee thereof, near or remote, as security for the payment of the aforesaid sum of \$500, and the interest accruing thereon. It is well settled that the purchaser of real estate is presumed to have examined the records of the deeds, necessary to make out his claim of title, and under which he claims, and is bound by the recitals in such deeds showing encumbrances, or the non-payment of purchase-money. He is charged with constructive notice of facts recited in a deed under which he claims, and is bound by such facts, even though he have no actual notice thereof. *Wiseman v. Hutchinson*, 20 Ind. 40; *Croskey v. Chapman*, 26 Ind. 333; *Colman v. Watson*, 54 Ind. 65; *Hazlett v. Sinclair*, 76 Ind. 488 (40 Am. R. 254); *Sample v. Cochran*, 84 Ind. 594. But in *Gilchrist v. Gough*, *supra*, it was held by this court, and correctly so, we think, that the record of any instrument entitled to be recorded is only notice, whether actual or constructive, of the existence and record of such instrument, and of the contents, *not* of the instrument itself, but *only* of such record. Accordingly, it was held in the case cited, that where a mortgage given to secure the sum of \$5,000, by the mistake of the recorder was recorded as given to secure only the sum of \$500, the record of such mortgage was notice to a subsequent mortgagee, in good faith and for a valuable consideration, only to the extent of \$500, the sum expressed in such record, and interest thereon. So here, by the mistake of the appellee Davis, as such recorder, the land conveyed by the relator was bound, in the hands of a subsequent purchaser thereof, in good faith and for a valuable consideration, as security for the payment of only \$200, the sum expressed in the record of the relator's

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deed, instead of \$500, the sum expressed in the deed itself, and the interest thereon.

Some of the averments of each paragraph of the complaint were not so full, clear and explicit as they might have been ; but such defects in pleading can only be reached and taken advantage of by motion to make such averments more certain and specific, and not by a demurrer for the want of facts. We are of opinion that in each paragraph of the complaint enough facts are stated by the relator to show a breach of his official duty by the appellee Davis, as such recorder, and that the relator was injured thereby. The court erred, we think, in sustaining appellees' demurrers to each paragraph of the relator's complaint.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrers to each paragraph of complaint, and for further proceedings not inconsistent with this opinion.

Filed April 22, 1884. Petition for a rehearing overruled June 26, 1884.

 No. 11,186.

GRIFFIN v. ROCHESTER.

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REAL ESTATE, ACTION TO RECOVER.—*Sheriff's Sale.—Notice to Quit, as to Judgment Debtor.—Demand.*—An execution defendant, remaining in possession of lands sold at sheriff's sale, is not a tenant entitled to notice to quit, nor need a demand for possession precede a suit in ejectment.

SAME.—*Right of Possession.—Vendor and Purchaser.—Executory Contract.*—An executory contract for the purchase of land, which is silent as to the right of possession, does not give that right to the purchaser.

SAME.—*Judgment.*—A judgment in ejectment by the vendor, against the vendee of land, under an executory contract, does not interfere with any remedies to which the purchaser may be entitled upon the subsequent performance of his contract.

From the Clinton Circuit Court.

S. A. Huff, G. O. Behm and A. O. Behm, for appellant.

S. P. Baird, for appellee.

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COLERICK, C.—This was an action to recover the possession of certain real estate. The court, by request, made a special finding of the facts and its conclusion of law thereon, to which the appellant excepted, and judgment was rendered against her. A motion for a new trial was made and overruled. The errors assigned are:

1. That the court erred in its conclusions of law upon the facts found.
2. That the facts found did not justify the conclusions of law.
3. That the court erred in overruling the appellant's objections and exceptions to the conclusions of law found by the court.
4. That the court erred in overruling the motion for a new trial.

The reason presented for a new trial was, that the special finding was not sustained by sufficient evidence. The evidence not being in the record, we can not, in its absence, review the ruling of the court upon the motion for a new trial.

The other reasons embraced in the assignment of errors present, in different forms, a single question, viz.: Did the court err in its conclusion of law?

"The findings are in seven divisions; the material facts found being as follows:

"1st. That one Madeleine Rochester recovered a judgment and decree of foreclosure against said appellant, due and to become due for over \$10,000, and an order for the sale of the real estate in question to pay the same; that said lot was not susceptible of division, and that it be sold in one body.

"2d. That said Madeleine Rochester, on the 10th day of May, 1873, bought said real estate at sheriff's sale, made on said judgment and decree, for the sum of \$7,000.

"3d. That on the 4th of February, 1879, said Madeleine Rochester surrendered to the sheriff of said county the certificate of sale for said real estate, and received from said sheriff a deed therefor executed pursuant to said sale.

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"4th. That on the 21st day of November, 1879, said Madeleine Rochester sold and conveyed said real estate to appellee.

"5th. That the appellee, on the day before this suit was brought, demanded of the appellant the possession of said real estate, and that the only reply made to said demand was '*umph*.'

"6th. That appellant was at the time of the trial, and had continuously been, in the possession of said real estate since 1871; that since the expiration of the year for redemption from said sale, and prior to the 26th day of December, 1879, said appellant paid to said Madeleine Rochester various sums of money, aggregating \$2,909.68; all of which was paid on the residue of the judgment, left after deducting the amount of the bid for said real estate at said sheriff's sale.

"7th. That in April, 1880, said appellee and appellant made a parol contract for the purchase of said real estate, as follows: Said appellant to pay appellee therefor \$6,000, to be made in payments of

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| Cash | \$100 |
| On the 1st of September, 1880 (\$2,000) | 2,000 |
| Residue in thirty-nine instalments of \$100 each . . . | 3,900 |

"Said thirty-nine instalments to be paid monthly from the date of sale, and all to bear six per cent. interest, the appellant to execute her notes and mortgage for the deferred payments and to deliver the same to appellee; the appellee to execute her deed for said real estate, and place the same in the hands of Hon. John R. Coffroth, to be held by him in reserve (escrow) until the payment of said \$2,000, and then to be delivered by said Coffroth to appellant; that said deed was executed and placed in the hands of said Coffroth as agreed, who still holds the same; that appellant paid the \$100 cash payment, but never delivered to the appellee the notes and mortgage; that said appellant never paid said \$2,000 payment, nor any part thereof; that said appellant (paid) on said \$100 notes before January 1st, 1882, principal and interest, the sum of \$1,819, making in all the sum of \$1,919 paid on said contract; that the rental value of said real es-

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tate from the 10th of May, 1873, to 12th of April, 1882, was \$400 per annum; that said appellant paid some, but not all the city taxes on said real estate since said sheriff's sale."

"The conclusion of law, upon the facts found by the court was: 1st. That the plaintiff, Ada Rochester, is the owner and entitled to the possession of the real estate in the complaint described. Judgment will be entered accordingly and against the defendant for costs."

The appellant asserts that she was, at the time of the conveyance to the appellee, in possession of the real estate in controversy as the tenant of the appellee's grantor, and contends that it was essential for the court to find, in order to authorize the rendition of said judgment, that notice to quit had been duly served upon her, as such tenant, prior to the commencement of the action, as required in such cases by the statute. This assertion is based, for its support, upon the fact found by the court that the appellant was permitted to remain in possession of said real estate for more than six years after its sale by the sheriff, and that during said time she paid a part of the taxes assessed thereon, and made payments on the residue of the judgment remaining unpaid after said sale. It may be true, as contended by the appellant, that the facts referred to tended to prove that the relation of landlord and tenant existed, but the court failed to find that such relation did, in fact, exist. The special finding, being silent upon this point, is to be regarded by this court as a finding thereon against the appellant, as the burden of proof upon that point rested upon her. *Graham v. State, ex rel.*, 66 Ind. 386; *Vannoy v. Duprez*, 72 Ind. 26; *Spraker v. Armstrong*, 79 Ind. 577; *Nitche v. Earle*, 88 Ind. 375; *Hunt v. Blanton*, 89 Ind. 38; *First Nat'l Bank, etc., v. Carter*, 89 Ind. 317.

The facts found by the court show that the appellant was occupying said real estate at the time of its sale by the sheriff, as the owner thereof, and it is safe to infer, from the facts found, that thereafter she continued to occupy the same as a judgment debtor; if so, no demand by the appellee for the

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surrender of possession was necessary before bringing this action. See *Smith v. Allen*, 1 Blackf. 22, where it was held that a judgment debtor in possession is not entitled to notice to quit previous to an action of ejectment by the purchaser at the sheriff's sale under the judgment. See, to same effect, *Meeker v. Doe*, 7 Blackf. 169; *Indianapolis, etc., Union v. Cleveland, etc., R. W. Co.*, 45 Ind. 281.

The contract of purchase, which is set forth in the special finding, was made by the appellant while she was occupying, as such judgment debtor, said real estate. The appellant did not take possession under said contract, and as it is silent as to her right of possession, she was not entitled, under its provisions, to either take or hold possession thereof. See *Doe v. Brown*, 7 Blackf. 142 (41 Am. Dec. 217); *Wright v. Blachley*, 3 Ind. 101; *Kratemayer v. Brink*, 17 Ind. 509; *Todd v. Collier*, 53 Ind. 122.

If the finding of the court as to the terms of the contract of purchase, or in any other respect, was too vague and uncertain to be understood, as claimed by the appellant, her proper remedy to reach the defects complained of was by a motion for a *venire de novo*. *Buskirk Pr.* 206; *Peters v. Lane*, 55 Ind. 391; *Leeds v. Boyer*, 59 Ind. 289.

This action merely involves the title and right of possession to the real estate in controversy. As was said by this court in *Kratemayer v. Brink*, *supra*, which was a case similar to this, "The judgment for the plaintiff in no way interferes with the rights of the defendant under his contract. If he performs the contract on his part, he will be entitled to the same remedies against the plaintiff for failure on his part as if this suit had not been brought."

There being no error in the record, the judgment must be affirmed.

PER CURIAM.—The judgment of the court below is affirmed, at the costs of the appellant.

Filed March 6, 1884. Petition for a rehearing overruled June 28, 1884.

Goodwin v. The State.

No. 9675.

GOODWIN v. THE STATE.

CRIMINAL LAW.—Murder.—Evidence.—Threats.—Consideration by Jury.—It is competent for the State, in a prosecution for murder, to prove threats made by the accused against the deceased, although made a long time prior to the homicide, but in determining their weight the jury may consider their remoteness from the time of the homicide.

SAME.—Declarations of Accused.—Effect of Ruling on Competency.—Where the declarations of an accused are susceptible of more than one interpretation, it is for the jury to determine from the evidence what interpretation they shall have, and the court, in ruling them to be competent, does not determine that they shall have an interpretation adverse to the innocence of the defendant.

SAME.—Witness.—Expert.—Definition of Words.—There is no error in refusing to permit an expert witness, on the direct examination, to give a definition of a word which has a fixed and well known signification.

SAME.—Hypothetical Questions.—Evidence.—It is not necessary to embody in a question asked an expert witness all of the matters of which there is any evidence; such a question is proper if it embodies such material facts, fairly within the range of the evidence, as counsel deem to have been proved.

SAME.—Opinion of Witness as to Accused's Power of Control.—It is not error to refuse to permit a witness to express an opinion as to whether a person accused of crime can or can not control his appetite for intoxicating liquor.

SAME.—Voluntary Drunkenness.—Voluntary drunkenness is no excuse for the crime of homicide.

SAME.—Evidence.—Discretion of Court.—Supreme Court.—The trial court may permit the State to introduce evidence after the defendant has closed his evidence, and the Supreme Court will not reverse a judgment unless the trial court has abused its discretionary power in this respect.

SAME.—Insanity.—Effect of Order of Commission.—The order of a commission composed of two justices of the peace and a physician, declaring a person to be insane and entitled to admission to the hospital for the insane, is not conclusive, and the State may introduce evidence tending to show the defendant's sanity, both before and after his admission into the hospital.

SAME.—Opinion of Non-Expert Witness.—A non-expert witness must state the facts upon which he bases his opinion, but if he states that he has had an acquaintance with the accused, and has had conversations and dealings with him, he may then express an opinion.

SAME.—Instructions.—Instructions are to be taken together, and if when so taken they express the law correctly, there is no available error.

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SAME.—Criminal Responsibility.—Where one has mental capacity sufficient to fully comprehend the nature and consequences of an act and unimpaired will power strong enough to master an impulse to commit a crime, there is criminal responsibility, and an instruction embodying this doctrine is a correct expression of the law.

SAME.—Mental Depravity.—It is not error to instruct the jury that mere mental depravity is not insanity.

SAME.—Delirium.—Instructions.—An instruction, that "Insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears, but where *delirium tremens* is set up as a defence, the delirium must exist at the time the act was committed, as there is no presumption of its existence from antecedent fits from which the offending person has recovered," is a substantially correct statement of the law.

SAME.—Value of Testimony of Expert Witness.—It is proper to give the following instruction: "The opinions of medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon them to the exclusion of all other evidence. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if any such doubt arises."

SAME.—The ruling in the case of *Gueting v. State*, 66 Ind. 94, approving instructions set forth in the opinion in that case adopted and followed.

SAME.—Insanity.—Perversion of the Affections.—A perversion of the affections does not constitute insanity, if there is mental capacity sufficient to fully comprehend the nature and consequences of a criminal act, and no disease of the will power impairing its strength.

SAME.—Declarations of Inmate of Hospital for the Insane.—An instruction, that "Any statement, declaration, or admission of the defendant that may have been introduced in evidence by the State, made while he was an inmate of the Indiana Hospital for the Insane, must be regarded and held by you in your consideration thereof, as the statement, declaration, or admission of a person of unsound mind, and allowed no weight whatever against the defendant, unless the evidence in this case proves to your satisfaction beyond a reasonable doubt, that the defendant was of sound mind when he made such statements, admissions, or declarations," was held to have been correctly refused.

SAME.—Motives.—It is not error to refuse an instruction, unless it is the duty of the court to give it in the terms in which it is prayed, and there is no error in refusing an instruction which gives undue prominence to the absence of motive, and to the fact that the homicide was committed under circumstances which rendered detection and arrest inevitable.

Goodwin v. The State.

SAME.—*Frenzy*.—A frenzy arising from passion is not mental unsoundness within the meaning of the law.

From the Franklin Circuit Court.

J. W. Gordon, R. N. Lamb, S. M. Shepard and S. S. Harrell, for appellant.

F. T. Hord, Attorney General, and *B. Burke*, Prosecuting Attorney, for the State.

ELLIOTT, J.—The appellant was convicted of murder in the first degree, and sentenced to the State's prison for life. The evidence conclusively proves that he shot to death his brother, John R. Goodwin, and the only question for the decision of the jury which, under the evidence, fairly admitted of dispute, was as to the mental condition of the accused at the time the homicide was committed.

Threats of the accused to shoot his brother, made thirty years before the homicide, when the former was a lad of fifteen, were proved, and the ruling of the court admitting this evidence is assailed as erroneous. There was other evidence of long continued hostility of the accused towards the deceased, and it can not be said, as matter of law, that ill-will may not begin in boyhood and continue into the years of manhood. The existence and continuance of malevolent feelings was a question of fact, and it was proper to submit to the jury all evidence bearing upon that question, leaving to them the decision of its credibility and weight.

Threats against life are always admissible against an accused, but their remoteness from the time of the homicide is a circumstance to be considered in determining the weight and effect to be assigned them. *People v. Cronin*, 34 Cal. 191; *State v. Ford*, 3 Strob. (S. C.) 517; *Keener v. State*, 18 Ga. 194.

Witnesses were allowed to state the contents of a letter written by the accused, wherein he directed the person to whom it was addressed to get his pistol from his brother, and retain it until his return from the place where the letter was

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written. There was no error in admitting this evidence. The foundation for the admission of secondary evidence had been laid by proof of the destruction of the letter, and the only question is as to the relevancy of the testimony. It is always proper to give evidence of the preparation for crime, such as the purchase or procurement of weapons, and it was not, therefore, improper to give evidence tending to show that some time before the homicide the accused took measures to secure a deadly weapon. It was proper to allow the evidence of the direction to secure and retain the pistol to go to the jury, and in so ruling the court did not decide anything as to the weight and effect of such evidence. In adjudging that evidence is competent, the court does not, as counsel assume, instruct the jury that it is to influence their decision; the court does no more than declare that the evidence is entitled to be heard; all else is left to the judgment of the jury.

Where the declarations of an accused are susceptible of two interpretations, one consistent with innocence, the other indicative of guilt, they are admissible in evidence. Attendant circumstances or connected facts may greatly modify, and, indeed, completely change, the meaning and effect of ambiguous expressions. Such declarations are to be considered in connection with all the other evidence in the case and are to be interpreted by the light it throws upon them.

Counsel are in error in assuming that the court in ruling that such declarations are admissible decides that they shall receive an interpretation inconsistent with innocence. The ruling has no such effect, for it extends no further than a decision that they shall be heard and considered in connection with the other evidence, leaving to the jury the duty of annexing to them their just signification.

The court refused to permit one of the appellant's witnesses to answer this question: "If the defendant was different from other people in his manner of living, or acting, or speaking, or eating, state in what respect?" In this there was no error.

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The question opened entirely too wide a field of investigation. The sanest men differ in their habits of life and conduct, and no good could have resulted from entering upon such a boundless field of inquiry. Criminal responsibility is not measured by men's peculiarities of habit, or eccentricities in modes of living. Comparisons such as that which the question called upon the witness to make would embarrass and perplex juries, rather than assist and enlighten them. The counsel were allowed to elicit from the witness not only an opinion of the mental condition of appellant, but also a full account of his habits, conduct and declarations, and thus received all the benefit from the witness's testimony that they had any right to ask.

There was no error in refusing to permit one of the expert witnesses called by the appellant to give the jury a definition of the word "monomania." It is not proper to ask witnesses to define words which have a fixed and well known significance, except, perhaps, in cross-examination.

It is contended with great earnestness and ability that the prosecutor, in propounding a hypothetical question to an expert witness, where insanity is the point in issue, must embody in his question all the matters of which there is any evidence; in other words, that the whole case must be embodied in the assumption made in the question of the examining counsel. In support of this contention we are referred to *People v. Thurston*, 2 Park. Cr. C. 49. We are unwilling to follow that case, for we are firmly convinced that it is unsound in principle, incapable of just application in practice, and unsanctioned by authority. A doctrine which requires a prosecutor to assume and embody in one question conflicting testimony can not be defended on any ground consistent with sound reason. It would operate unjustly in practice, because it would impose upon an examining counsel the necessity of assuming as true that which he denies in fact, and thus the jury would be confused and perplexed by an apparent

admission of facts antagonistic to the theory of the prosecution. It would require the court, whenever an objection was interposed, to determine what facts were proved, and what were not, and thus compel an invasion of the province of the jury. It would produce endless wrangling and confusion, darken and obscure the investigation of the recondite subject of mental capacity, and place the falsest testimony and the absurdest statements on an equality with the truest and most reasonable. On the other hand, no harm can be done the accused by holding that the examining counsel may assume such a case as the evidence in his judgment makes out, and which keeps within the range of the relevant testimony, because the prisoner's counsel may, on cross-examination, add to the hypothetical case supposed by the prosecutor, such facts as he deems the evidence to have established, or subtract from it such facts as he supposes to have been disproved, or not to have been proved. We are not without decisions in our reports. In *Bishop v. Spining*, 38 Ind. 143, WORDEN, C. J., admirably stated the rule: "The party seeking an opinion in such case may, within reasonable limits, put his case hypothetically as he claims it to have been proved, and take the opinion of the witness thereon, leaving the jury, of course, to determine whether the hypothetical case put is the real one proved." This doctrine is asserted in the cases of *Guetig v. State*, 66 Ind. 94, *Nave v. Tucker*, 70 Ind. 15, *Davis v. State*, 35 Ind. 496 (9 Am. R. 760), and is well sustained by the decisions of other States, as the citations given by Wharton in his work on criminal evidence abundantly show. We find in the case of *Cowley v. People*, 83 N. Y. 464 (38 Am. R. 464), a statement of the rule which deserves repetition. In speaking of a hypothetical question the court said: "The very meaning of the word is that it supposes, assumes something for the time being. Each side, in an issue of fact, has its theory of what is the true state of the facts, and assumes that it can prove it to be so to the satisfaction of the jury; and

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so assuming, shapes hypothetical questions to experts accordingly. And such is the correct practice." *Guiterman v. Liverpool, etc., Co.*, 83 N. Y. 358.

It was not error to refuse permission to ask a non-expert witness whether the accused could control his appetite for intoxicating liquor. Men who are not insane must control their appetites and passions. With quite as much propriety might a witness be asked in a case of rape whether the accused could control his lustful desire, and with just as much reason might a witness be asked whether a prisoner could control his anger or master his desire for revenge, and to permit such things to excuse crime would be to break down all law and set a premium on masterful evil passions. While the law shields from punishment one who does an act when insane from the continued use of intoxicating liquor, it does not permit him to set up his voluntary drunkenness as an excuse for taking human life. If the rule for which counsel contends should prevail, then the common drunkard, whose appetite controls his mind and will, may with impunity commit the gravest crimes, but, happily, the law is subject to no such reproach. *Cluck v. State*, 40 Ind. 263; *Gillooley v. State*, 58 Ind. 182; *Bradley v. State*, 31 Ind. 492; *People v. Ferris*, 2 Crim. L. Mag. 18; *State v. Hundley*, 46 Mo. 414; *Carter v. State*, 12 Texas, 500; *U. S. v. McGlue*, 1 Curtis C. C. 1.

The question in this case was not whether the appellant could refrain from strong drink, but whether he was insane when he slew his brother. If, however, the question had been the power of the accused to refrain from the use of liquor, the interrogatory would have been improper, for the reason that it is not competent to ask a witness whether a man has capacity to do or refrain from doing a particular thing. It is proper to inquire generally as to mental capacity, but it is not proper to inquire whether there is or is not capacity to do a specific act, as, for instance, to execute a will, make a contract, or commit a designated crime. 2 Taylor Ev. 1229.

The appellant's counsel assail the action of the court in

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permitting Thomas A. Goodwin to testify after the evidence for the defence was in, but we can not reverse upon this ground. The matter of admitting evidence in reply is so much within the discretion of the trial court that the appellate courts uniformly refuse to interfere unless it clearly appears that there has been an abuse of discretion resulting in manifest injury to the accused. *Merrick v. State*, 63 Ind. 327; *Pittsburgh, etc., R. R. Co. v. Noel*, 77 Ind. 110; *Case v. Grim*, 77 Ind. 565; *Carter v. Zenblin*, 68 Ind. 436; *Gardiner v. People*, 6 Park. C. C. 155; *State v. Hudson*, 50 Iowa, 157; *Phillips v. State*, 6 Texas App. 44.

The case before us is not one warranting our interference. We are, moreover, inclined to think that the material parts of the witness's testimony were strictly competent in rebuttal. The conversations which the witness had with his brother, the appellant, while they tended to prove motive, tended also to prove that the accused conversed intelligently and possessed full command of his reasoning faculties and will power. We do not understand that testimony tending to show sanity is to be rejected because it bears against the accused upon some other point.

The evidence shows that the appellant was examined before a commission composed of two justices of the peace and a physician, declared insane, and ordered to be committed to the hospital for the insane. The judgment of the justices, even if competent evidence at all, was not conclusive upon the question of appellant's sanity, and it was competent for the State to introduce evidence tending to show his mental condition before and after the proceedings before the justices. The statute authorizing such proceedings does not contemplate that they shall be conclusive adjudications, but that they shall have the effect to entitle the person pronounced insane to be placed in the hospital for treatment. The proceedings do not estop the person declared insane from asserting his sanity, nor do they preclude others from litigating that question.

It is settled law that a non-expert witness must state the

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facts upon which he bases his opinion. There must be some facts upon which the opinion can rest, or it must not be expressed; what facts are sufficient to justify the formation and expression of an opinion by a non-expert witness, it is by no means easy to declare. It is, however, agreed by the authorities that if the witness shows an acquaintance with the accused, that he has had conversation with him, or that he has had business dealings or social intercourse with him, he may, having stated the facts, express an opinion. *Colee v. State*, 75 Ind. 511; *Leach v. Prebster*, 39 Ind. 492; *People v. Wreden*, 12 Reporter, 682; *State v. Felter*, 25 Iowa, 67; *Schlencker v. State*, 9 Neb. 241; *Powell v. State*, 25 Ala. 21; *Stubbs v. Houston*, 33 Ala. 555.

The value of an opinion expressed by a non-expert witness depends upon the facts on which it rests, but its competency is not measured by this standard, for an opinion of little value may nevertheless be competent. If any material facts at all are stated by the witness warranting the inference that he has sufficient knowledge to form an opinion, it is the duty of the court to permit it to go to the jury for whatever it may be worth. We have read with care the testimony of all the non-expert witnesses named in the brief of counsel, and see no reason to doubt the correctness of the ruling of the trial court holding their opinion competent.

The fourteenth instruction is an exact copy of one approved in the case of *Binns v. State*, 66 Ind. 428, and on the authority of that case we hold that there was no error in giving it, although we can not regard the instruction as a model worthy of imitation. The instruction immediately following the one just mentioned reads thus: "In the grade of felonious homicide there must be the element of malice and premeditation. If either of these elements be absent, there can be no conviction of this grade of homicide. A premeditated design or purpose is one resulting from thought and reflection. A design conceived and afterwards so deliberately considered as to become resolved and fixed is regarded by the law

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as premeditated." The objection to this instruction is that it contradicts the one preceding it, but we are not inclined to adopt this view. We think it is to be considered in connection with the former, and when the two are taken together, as they may well be, they express the law as favorably to the appellant as was proper. *Binns v. State, supra*; *Achey v. State*, 64 Ind. 56.

It was not error to inform the jury, as instruction number seventeen did, that among the usual evidences of premeditation are previous preparation to take life, expressions of ill-will and hatred, and previous threats to kill.

The twenty-third instruction is somewhat confused, but, taken in connection with those which immediately precede and follow, its meaning is very plain. In the twenty-second instruction the jury were told, among other things, that, "Under our law a person of unsound mind can not be convicted of any crime," and when this is read in connection with instruction twenty-three, the meaning of the latter instruction is that no matter what may have caused the mental unsoundness the defendant was entitled to an acquittal; but, although there was some mental derangement, still if "he had mental capacity sufficient to adequately comprehend the nature and consequences of his act, and unimpaired will power fully sufficient to control an impulse to commit crime, he was not entitled to an acquittal upon the ground of mental incapacity." Thus understood—and taking it in connection with the instruction with which it was closely associated, no reasonable man could have otherwise understood it—the instruction correctly expressed the law.

We are not disposed to question the soundness of the rule that instructions must not be contradictory; but we do affirm that one instruction may be qualified and explained by another intimately connected with it, and that if all the instructions upon the same point, taken together, correctly state the law, there is no error. *Achey v. State, supra*. As said in a recent work, "The jury are presumed to have understood

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the charge according to the fair import of its terms when taken together." Thompson Charging the Jury, 173.

Where there is mental capacity sufficient to fully comprehend the nature and consequences of an act, and unimpaired will power strong enough to master an impulse to commit a crime, there is criminal responsibility. This subject has been so ably and thoroughly discussed of late that it needs no discussion from us. The only doubt unsolved is whether it is proper to separate the will power from the understanding, but this has been done by our cases, as well as many others, and we must take it as a settled principle. *Guiteau's Case*, 3 Crim. L. Mag. 347; S. C. 10 Fed. R. 161, and notes; *Bradley v. State*, 31 Ind. 492.

The twenty-fourth instruction is criticised because it informs the jury, among other things, that mere mental depravity is not insanity; but the criticism is unjust. This doctrine of moral insanity never did have a place in the law, and is now repudiated by the better authority. This is proved in the authorities cited in the note to *Guiteau's Case*, 3 Crim. L. Mag. 375, Fed. R. 161, and North Am. R., January, 1882.

This instruction is also criticised because it says that "depression following from physical illness, and such as in all respects ordinarily takes place with men possessing fair average mental powers," is not insanity. There is no ground for criticism. If what the instruction asserts is not law, then it is law that the depression ordinarily resulting from physical illness makes men insane, and excuses them from the consequences of criminal acts, and this surely is a conclusion that no reasonable man would undertake to maintain.

The twenty-fifth instruction is copied from one approved in *Guetig v. State*, 66 Ind. 94 (32 Am. R. 99), and is a correct statement of the law. Instructions to Juries, 524.

The 29th instruction reads thus: "Insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears, but where *delirium tremens* is set up as a defence, the delirium must exist at the time the

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act was committed, as there is no presumption of its existence from antecedent fits from which the offending party has recovered." There is nothing in this instruction of which the appellant can justly complain. Whether it states the law too strongly against the State in the introductory sentence we need not inquire, for, if it did, that would afford appellant no reason for complaint. It certainly states the law correctly as to *delirium tremens*, for this is a mere transient derangement of the mind, and there is no presumption of its recurrence or continuance. 2 Bishop Crim. Proc., section 674. We think the instruction was not irrelevant to the case made by the evidence. We do not understand that the court in charging the jury is bound to confine itself to such phases of the case as counsel deem the important ones, but may instruct upon all the material phases which the case may assume under the evidence.

The thirty-first instruction reads thus: "The opinions of medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon them to the exclusion of all other evidence. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if any such doubt arises." The objection urged against this instruction is that it informs the jury that the testimony of experts is not entitled to greater weight than that of non-expert witnesses. We do not think the argument is correct either in point of fact or law. The instruction does not, as counsel assume, direct the jury to act upon one class of evidence to the exclusion of the others, but in plain terms instructs them to consider the whole evidence. But counsel's theory of the law is radically wrong. It would have been error for the court to tell the jury that the expert witnesses, speaking merely as to matters of opinion, and basing their opinions on

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hypothetical questions, were entitled to more credit than witnesses who had knowledge of facts gathered from personal observation and who based their opinions on actual facts and not supposed cases. As both kinds of evidence are competent, the jury are charged with the duty of determining the weight and effect of the evidence in each particular case, and the court has no right to charge them to give preference to the one class or the other. *Tatum v. Mohr*, 21 Ark. 349; *Chandler v. Barrett*, 21 La. Ann. 58; *State v. Bailey*, 4 La. Ann. 376.

Instruction thirty-two is substantially copied from instruction number fifteen in the case of *Guetig v. State*, *supra*, of which the court there said: "Instructions numbered 13 and 15 properly express the law, and are fully sustained by the authorities cited under question numbered 2, already discussed."

There was no error in charging the jury, as was done in the thirty-fifth instruction, that they should carefully scrutinize the evidence upon the subject of insanity. It is the duty of jurors to carefully consider and weigh such evidence, and to give it the weight and credit which their judgments and consciences deem it entitled to receive. *State v. Martin*, 3 Crim. L. Mag. 44; *Guileau's Case*, *supra*.

Counsel select from this instruction a clause reading thus: "The evidence to this point should be carefully considered and weighed by the jury, for the reason that if the accused was, in truth, insane at the time of the commission of the alleged acts, then he ought not to be punished for such acts," and urge that this entitles them to a reversal, because, as they say, the question was, not whether the accused was in truth insane, but whether the jury entertained a reasonable doubt on that subject. The objection is not well taken. The court was not informing the jury as to the degree of evidence required to convict the accused, but was simply assigning a reason why the evidence deserved careful scrutiny. Other instructions fully and correctly defined the degree of evidence

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required, in order to entitle the State to a verdict of conviction, and the jury could not have been misled.

The eighth instruction asked by the appellant was correctly refused, for the reason that the propositions of law stated in it were contained in the instructions given by the court. Where the instructions of the court fully cover the ground and correctly state the law, it is not error to refuse instructions upon the same subject, although they are correct expositions of the law.

The theory of the tenth instruction asked by the accused and refused by the court is, that if one labors under a perversion of the affections, irresistibly impelling him to crime, the law holds him guiltless. This is an affirmance of the doctrine of moral insanity, of which we have already expressed our opinion. Where there is sufficient mental capacity to fully comprehend the character and consequences of a criminal act, and no disease of the will power impairing its strength, there can be no acquittal upon the ground of a perversion of the affections. If it were otherwise, then the husband or lover who has his affections perverted by a fit of jealousy, and takes the life of his wife or mistress, could not be deemed accountable, and against this conclusion the conscience and judgment revolt. The man whose understanding and will power are not diseased must not yield to the sway of perverted affections. If he does yield, and takes human life, he must suffer the punishment the law affixes to felonious homicide. Present, the mind to judge and know, the will to govern and control, there is criminal responsibility, although there may be a perversion of the affections and hatred may have taken the place of love.

Of several of the instructions asked and refused, we deem it only necessary to say that they were fully and fairly embraced in those given by the court, and where this is the case a refusal to repeat the rules of law is not error.

The court was not bound to instruct the jury to disregard

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the testimony introduced in reply to that of the defence, even though it tended to prove malice and premeditation. We have already disposed of this question in what we have said as to the authority of the court to allow the State to give evidence in chief after the close of the evidence of the defendant.

The fifteenth instruction asked and refused reads thus: "Any statement, declaration, or admission of the defendant that may have been introduced in evidence by the State, made while he was an inmate of the Indiana Hospital for the Insane, must be regarded and held by you in your consideration thereof, as the statement, declaration, or admission of a person of unsound mind, and allowed no weight whatever against the defendant, unless the evidence in this case proves to your satisfaction beyond a reasonable doubt, that the defendant was of sound mind when he made such statements, admissions or declarations." The court did right in refusing this instruction. It assumes that the fact that the appellant was confined in the hospital is *prima facie* evidence of insanity, and this is an assumption the court had no right to make. The question was one for the jury upon all the evidence. It would have been error for the court to have singled out the commitment to the hospital and to have affirmed that it proved insanity. On a question very similar to that before us, the Supreme Court of Ohio said: "Ordinarily, such inquisitions are not conclusive, but only *prima facie* evidence of incapacity, as will be seen from the authorities cited; but, on a question like that in issue here, it is manifest they can not be regarded as even *prima facie* evidence." *Wheeler v. State*, 34 Ohio St. 394. It is maintained with much force in *Leggate v. Clark*, 111 Mass. 308, that the evidence is incompetent, and we are not prepared to say this is not the correct rule. The statute did not intend to do more than provide a method of procedure limited and restrained to a single purpose, and there is much reason for declaring that the judgment of the commission is not evidence in a civil action or a criminal prosecution. It is a very different thing from an inquisition of lunacy, for in such a

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proceeding the *status* of the party is fixed as to all the world ; while the statutory inquiry by the justices is restricted to one specific purpose. But we need not determine the competency of the evidence, for that question is not before us. Conceding that the judgment of the commission was some evidence, it would not have been proper for the court to fix and determine its weight and value.

For another reason the instruction was rightly refused. The declarations made while the accused was in the insane hospital were admissible upon the question of his mental condition at the time, and the instruction, if given, would have excluded them from the consideration of the jury solely on the ground that he had been committed to the hospital. This would have assigned to the judgment of the justices an effect far greater than it was entitled to. The judgment did not conclude the State from inquiring as to the appellant's sanity while he was in the hospital, and the right to make this inquiry necessarily involved the right to give evidence of his statements. These statements were entitled to be received upon the question which the instruction wrongly assumes the judgment of the commission to have settled. It was proper to consider the conduct and declarations of the accused while in the hospital on the question as to his mental condition at that time, and it would have been erroneous to charge the jury, as this instruction proposed, that the conduct of the accused while in the hospital should not be considered upon that question, unless his sanity was proved beyond a reasonable doubt by other evidence. The instruction does not assert that the declarations shall not be considered upon one question, but broadly asserts that they shall not be considered upon any question, thus asking that they be excluded from consideration on the question of sanity as well as on all other questions.

The sixteenth instruction, asked by the appellant, is as follows: " It will be proper for you to inquire what motive, if any, consistent with sanity is shown by the evidence to have

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existed in the mind of the defendant for taking the life of the deceased in the way, place, and circumstances in which the act was done; and if there is a want of such motive, as shown by the whole evidence, for the alleged crime, the fact that it was done under circumstances which rendered detection and arrest inevitable, if it was so done, are important points for your consideration, especially when coupled with evidence of insanity on any particular point."

It is not error to refuse an instruction unless it is the duty of the court to give it in the terms in which it is prayed. *Lawrenceburgh, etc., R. R. Co. v. Montgomery*, 7 Ind. 474; *Roots v. Tyner*, 10 Ind. 87; Thompson Charging the Jury, section 86; Proffatt Jury Trial, section 440. Our inquiry, therefore, is whether the court was bound to read the instruction to the jury as it was written.

One of the evidences of crime and sanity is the presence of a motive in the mind of the accused. "Motive," said the Court of Appeals of New York, "is an inducement, or that which leads or tempts the mind to indulge the criminal act. It is resorted to as a means of arriving at an ultimate fact, not for the purpose of explaining the reason of a criminal act which has been clearly proved, but from the important aid it may render in completing the proof of the commission of the act when it might otherwise remain in doubt. With motives, in any speculative sense, neither the law nor the tribunal which administers it has any concern." *People v. Bennett*, 49 N. Y. 137. Motive precedes purpose, intent, and design, and is the influence which creates purpose and design. Sane men are generally regarded as acting from motive, although it is said there may be motiveless crimes. Wharton and Stille Med. Juris., section 405; Wharton Cr. Ev., section 784; *State v. Cohn*, 9 Nev. 179; *State v. Larkin*, 11 Nev. 314. The absence of motive is regarded as a fact tending to show that the criminal act was the product of a mind incapable of forming an intent. It is not, however, true that because the motive is not apparent it is to be pre-

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sumed that none existed, nor is it true that an absence of motive proves a man insane, or proves him innocent. There are many recorded cases where atrocious crimes were committed in sheer recklessness, neither the hope of gain nor the gratification of any passion prompting the act. Wharton Crim. Ev., section 784, auth. n. Exceptional cases there are, but the general rule unquestionably is that sane men are influenced by motives, while the insane are motiveless. The presence of motive is, in general, evidence of sanity; its absence is evidence of insanity, but in neither case is the evidence conclusive. It would have been proper for the court to instruct the jury that evidence of the absence of motive was entitled to consideration upon the question of mental capacity, but we are inclined to the opinion that it would not have been proper to characterize it as important evidence. *Karow v. Continental, etc., Co.*, 15 Cent. L. J. 233; *Clough v. State*, 7 Neb. 320.

The instruction refused does more than assert that the absence of motive is an important matter for the consideration of the jury; it connects other facts with it, and asserts the same thing of them. One of the facts thus made prominent is that referred to in the clause of the instruction which reads thus: "The fact that it was done under circumstances which rendered detection and arrest inevitable." If this instruction had been given as asked, it would have allotted undue prominence to the fact that the homicide was committed under such circumstances as made detection inevitable. The fact that a crime is openly committed, and that the perpetrator commits it at a time and place which render his arrest certain, is not one tending to show insanity or prove innocence. The most heinous murders are frequently perpetrated under circumstances which render escape impossible. Homicides prompted by such evil passions as jealousy, revenge and anger, are more often committed in open day and in frequented places than in secret. This the reported cases fully show. No inference of insanity, no presumption of innocence, can arise

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from the fact that the homicide was committed under such circumstances as made detection and arrest inevitable.

The instruction emphatically asserts that the fact that the killing was done under circumstances surely leading to detection is an important consideration; for, connecting this fact with that of the absence of motive, it affirms that these "are important points" for the consideration of the jury, "especially when coupled with evidence of insanity on any particular point." The meaning of this is, that the fact of the absence of motive, as well as that the killing was done under circumstances making detection inevitable, are, in any event, both important matters for the consideration of the jury, but especially so if there is evidence of insanity. Thus understood, and giving the words used their just and ordinary signification, the instruction can not be understood in any other way; the instruction asserted an erroneous proposition, because the fact that the killing was done under circumstances making detection and arrest certain is not to be considered as an important fact ranging alongside of absence of motive or evidence of insanity.

It is error to give undue prominence in instructions to unimportant facts, and it is, of course, proper to refuse instructions which do this. Charging the Jury, 101. Instructions which suggest improper inferences are faulty. Proffatt Jury Trial, section 336; *Little Miami R. R. Co. v. Wetmore*, 19 Ohio St. 110; S. C., 2 Am. R. 373. Instructions which are more likely to mislead than to enlighten the jury should be refused. In *Sumner v. State*, 5 Blackf. 579 (36 Am. Dec. 561), the instructions refused were less obscure than the one under examination, and the court held that they were rightly refused, saying: "It is a sufficient objection to them, that they might convey to the mind of an unprofessional man of ordinary capacity, an incorrect view of the law applicable to the cause." In *Farrish v. State*, 63 Ala. 164, the court said: "In laying down a rule for the government of a jury, accuracy, clearness, and precision should be studied and sought after. It is never a reversi-

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ble error to refuse a charge, the tendency of which, unexplained, is to mislead, or which, considered in connection with the evidence, requires explanation of one or more of its propositions to render it a safe and certain guide for the jury." To a like effect is the decision in *Baxter v. People*, 3 Gilm. 368, where it was said: "When instructions are so drawn, either from carelessness or design, that they will be more likely to mislead than instruct the jury, although after a careful study and investigation, we may be able to extract a correct principle of law from them, it becomes the undoubted duty of the court to refuse such instructions. * * * Instructions ought not to be given unless they may be fairly understood and easily comprehended by the jury." In *Clough v. State*, 7 Neb. 320, the instruction asked and refused was as follows: "If the evidence fails to show any apparent motive on the part of the accused to commit the crime charged, it ought to operate *strongly* as a circumstance in favor of the accused." The court held that it was properly refused, saying: "It would not have been proper for the court to have charged the jury as matter of law what effect the failure to show a motive to commit the crime should have. The court had no right to say whether it should operate 'strongly' or otherwise."

It is proper for the court to direct the minds of the jury to the facts of the case, but it is not proper for it to annex weight and value to them; that is the exclusive province of the jury. *Garfield v. State*, 74 Ind. 60.

To have given the instruction in the terms in which it is couched would have been to direct the jury that the fact that the homicide was openly committed was one of importance, equal to that of the absence of motive, and this would have been erroneous. More than this, absence of motive and the manner of slaying are grouped with evidence of insanity, thus asserting that the latter fact is entitled to consideration, and important consideration, upon the question of mental capacity. Putting these facts together as the instruction does would

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have given the jury an erroneous view of the law. At all events, it would have given undue prominence, and in an improper connection, to an unimportant fact, and for this latter reason, if for no other, the trial court was justified in refusing the instruction. Instructions to Juries, 16.

Instructions must be not only correct as abstract statements of law, but correct, also, in their applicability to the evidence in the particular case. The evidence of the prosecution tended to show, and with convincing force, that the killing was the result of a long and deeply settled purpose, and one likely to be openly and boldly executed. It was not a case in which the slayer might be expected to conceal his crime or cover his conduct with the mantle of secrecy. The conduct and character of the accused were such as to create the presumption that he would, if sane, have done what he did publicly and not secretly. The manner of the slaying was, in this particular case, strictly consistent with sanity, for it would have been strange if such a man as the evidence shows the appellant to be had not slain his victim openly. It would have been error to instruct the jury in such a case as the evidence before us makes, that the manner in which the homicide was committed tended to prove insanity. The manner in which the crime of the accused was committed is, as the evidence shows, consistent with sanity, and not indicative of insanity, and the court could not justly have declared otherwise.

It is not the duty of the court to pronounce upon minor and subsidiary facts, which depend for their weight and value upon other facts. All such facts should be submitted to the jury without any expressed opinion as to their weight, leaving it to the jury to give them that consideration which the jurors may deem them entitled to receive when considered in connection with the whole evidence.

It is necessary that every fact which constitutes an essential ingredient of a crime charged against an accused should be proved beyond a reasonable doubt, but it is not necessary that

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incidental or subsidiary facts should be proved by such a degree of evidence in order to entitle them to the consideration of the jury. *Wade v. State*, 71 Ind. 535.

Evidence is not to be considered in fragmentary parts and as though each fact or circumstance stood apart from the others, but the entire evidence is to be considered and the weight of testimony to be determined from the whole body of the evidence. A circumstance considered apart from the other evidence may be weak, if not improbable, but when viewed in connection with surrounding facts and circumstances may be so well supported as to remove all doubt as to its existence as detailed by the witness. Acts considered apart from all other evidence may appear innocent, but when considered with other evidence may import guilt. The seventeenth and eighteenth instructions asked fall before this rule.

The appellant asked the court to instruct the jury as follows: "Any person is of unsound mind who is an idiot, *non compos mentis*, a lunatic, or a monomaniac, or a distracted person." We do not think it was error to refuse to so instruct. It is true that the instruction is a copy of the statutory definition of insanity (R. S. 1881, section 2544), but we do not believe the definition one which ought to be given in a criminal prosecution, nor do we believe the Legislature meant that it should be used in such cases. The words used in the definition are general, and the signification of some of them vague and indefinite, and to give the definition to the jury could serve no useful purpose, since it would tend only to produce confusion. The term "distracted person" would convey to the jury an erroneous idea of the law, for in criminal jurisprudence distracted persons are not necessarily insane. At all events, no error was committed in refusing this instruction, for the reason that the court had, in other instructions, fully and correctly defined mental unsoundness, and had informed the jury what degree was essential in order to entitle the appellant to an acquittal.

The value of the testimony of expert witnesses, as, indeed,

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of all witnesses, depends in a great degree upon their knowledge and integrity, and in so far as the instruction asked by the appellant asserted this well known truth, it was correct, but we do not think any case should be reversed because of the failure of the court to embody in an instruction a familiar truth, and one which all persons of ordinary intelligence are presumed to know. It would do little credit to jurors to presume that they did not know that two great requisites of a witness's credibility are knowledge and integrity, and the refusal to charge them upon such a matter can not be more than a harmless error, if, indeed, it can justly be held error at all. But the instruction was too narrow; it left out many other things which are proper for consideration, namely, interest, behavior on the witness stand, and other like matters which are always to be considered in determining the weight to be assigned to the testimony of a witness. The court is not bound to give an instruction which does not fully cover the particular point upon which it assumes to state the law.

The court ought not to give any instruction which will indicate to the jury that they are to prefer the testimony of expert witnesses to those who are non-experts, but who speak as to facts passing under their own observation and who base their opinions on these facts. The question as to which class of witnesses is entitled to the greater weight is for the jury, and not for the court, although the current of modern authorities is setting strongly against what is called expert evidence. Whart. Cr. Ev., section 420, auth. n.

Much labor has been bestowed upon this case by appellant's counsel, and we have given their able and elaborate argument careful consideration, but have found no reason which would justify us in reversing the judgment.

Judgment affirmed.

Filed April 17, 1883.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—It is now more than fourteen months since

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the original opinion in this case was filed, but it is only a short time since the brief on the petition for a rehearing was placed on file. The brief has been prepared with care, is an able and elaborate one, and contains a philosophical and thoughtful discussion of the questions involved. Influenced by the earnestness of counsel, we have again given the case full and careful consideration.

The principal position taken by counsel is that hypothetical questions asked an expert witness must embody all of the facts of which there is any evidence. It is assumed, as the chief support of this argument, that the analogue of such questions is found in the instructions of the court to the jury. It is not difficult to perceive that this assumption can not be made good either practically or theoretically.

The argument from analogy is forcible only when the resemblance is close; if there are marked points of difference between the conclusion deduced and the examples taken as leading by analogy to it, the argument fails. The resemblance between the analogue assumed as a just one by counsel, and the real case, fades away upon close inspection. There is one point of difference so plain and so material that no valid train of analogical reason can be pursued, and that point of difference is the situation of court and counsel. The court sits as an impartial arbiter of the law, charged with the duty of presenting the case for both parties; while counsel are charged with the duty of maintaining the theory which in their judgment is the true one. From the judge a different statement of facts, made in a different form and for a different purpose, is required from that which is expected or required of counsel. Counsel assume the facts which they think the evidence tends to prove, and the jury decide whether the facts assumed by counsel are established by the evidence.

If we should accept as true the assumption of counsel, that the resemblance between the instructions of the court and the questions of counsel is perfect, still, the conclusion which

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appellant's counsel deduce is not a just one, because the court is not bound to rehearse all of the evidence in its instructions.

The law is a practical science and is intended to furnish rules which will enable the jury to ascertain the ultimate and ruling facts and arrive at a just result, and no rule can be recognized which is impracticable in operation. The rule stated by counsel is impracticable; it is simply impossible to carry it into force. Among the reasons which support this conclusion are these: If the court were required to determine whether the hypothetical question correctly stated all the facts, it would be compelled to usurp the functions of the jury. If the court were required to determine whether all the facts were stated, it would be compelled to wrest from the jury the right to determine the credibility of witnesses. If the hypothetical question were required to embrace all the facts, then there would be an end to all certainty in trials, for confusion and endless wrangling must inevitably flow from such a rule.

There is no injustice in the rule that counsel may assume such facts as he deems proved, for the opposing counsel can, on cross-examination, add to the question all such additional facts as he deems proved, or take from it all such facts as he thinks have not been proved, or that have been disproved. By this course the case can, without uncertainty or confusion, be placed fully before the jury.

The adjudged cases and the text-writers are overwhelmingly against the position taken by appellant's counsel. Since the former opinion was filed, we have followed the earlier cases cited in the former opinion. *Elliott v. Russell*, 92 Ind. 526. The question is not an open one in this State. The cases cited in the opinion heretofore filed from other courts show that the entire current of judicial opinion is in harmony with our decisions, and since it was filed two works on expert evidence have been given to the profession which declare the same doctrine and cite many cases. In one of these books it is said: "It is the privilege of the counsel in such cases to as-

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sume, within the limits of the evidence, any state of facts which he claims the evidence justifies, and have the opinion of experts upon the facts thus assumed." Lawson Expert and Opinion Ev. 153. In the other work it is said, in speaking of a hypothetical question: "If framed on the assumption of certain facts, counsel may assume the facts in accordance with his theory of them, it not being essential that he should state the facts as they actually exist." Rogers Expert Testimony, 39. In addition to the authorities cited by these authors may be cited the recent case of *Stearns v. Field*, 90 N. Y. 640, wherein it was said: "It is well settled that when the testimony of experts is proper, counsel may assume the existence of any state of facts which the evidence fairly tends to justify." At another place in the same opinion it was said: "A striking illustration of the extent to which the rule is carried is found in *Harnett v. Garvey*, 66 N. Y. 641, where it is held that an error in the assumption does not make the interrogatory objectionable, if it is within the possible or probable range of the evidence." Again, it was said: "Such a question is not improper, because it includes only a part of the facts in evidence. *Mercer v. Vose*, 67 N. Y. 56." These authorities, to which many might be added and against which none are arrayed (except the solitary case commented on in the former opinion, which has long since been denied by this and all other courts), fully sustain our ruling that a hypothetical question may assume such facts as the examining counsel deem proved, if they are within the range of the evidence, and that such a question is not improper because it states less or states more than opposing counsel deem the evidence to establish.

The cases of *Erickson v. Smith*, 2 Abbott App. Cases, 64, and *Seymour v. Fellows*, 77 N. Y. 178, are not at all in point. *Guterman v. Liverpool, etc., Co.*, 83 N. Y. 358, and *People v. Lake*, 12 N. Y. 358, decide that it is not proper for a physician who has heard part of the testimony to give his opinion on it; but they also decide that he should give his opinion as to what the facts, proved or claimed to be proved, indicate

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as to the mental condition of the party, and this is in harmony with our ruling. In *Rush v. Megee*, 36 Ind. 69, many cases condemning expert evidence are cited, but we find no point decided that lends counsel any assistance; on the contrary it is strongly against them. We can not take time to comment on all of the cases cited by counsel, and we dismiss them with the statement that, with the one exception already referred to, they do not sustain their contention.

The decision in *Sage v. State*, 91 Ind. 141, is that where there is mental unsoundness the defendant is entitled to an acquittal, and that, under our statute, mental unsoundness does not merely mitigate the offence but excuses it. That decision does not profess to define mental unsoundness; the question of what constitutes mental unsoundness was not in the case. *Eggers v. Eggers*, 57 Ind. 461, does not profess to state what constitutes insanity, but simply decides that no matter what form the derangement assumes, it is mental unsoundness; the question was as to the form of the mental disease, not as to what constitutes disease of the mind sufficient to absolve from responsibility. The rule as to what constitutes mental unsoundness in civil cases is stated in *Somers v. Pumphrey*, 24 Ind. 231. As applicable to criminal cases, the rule is thus stated in an instruction fully approved in *Sawyer v. State*, 35 Ind. 80: "It is not every slight aberration of the mind, not every case of slight mental derangement, that will excuse a person for the commission of an act in violation of law." The rule heretofore stated that where there is mental capacity sufficient to fully comprehend the nature and consequences of the act, and unimpaired will power strong enough to master an impulse to commit crime, there is criminal responsibility, is sustained by the case just named, and by the following cases, which we add to the authorities heretofore cited: *Freeman v. People*, 4 Denio, 9 (47 Am. Dec. 216); *Bovard v. State*, 30 Miss. 600; *State v. Erb*, 74 Mo. 199; *De-Jarnette v. Com.*, 75 Va. 867; *Flanagan v. People*, 52 N. Y. 467; S. C., 11 Am. R. 731; *Walker v. People*, 26 Hun, 67; S.

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C., 88 N. Y. 81; *State v. Mewherter*, 46 Iowa, 88; *Com. v. Rogers*, 7 Met. 500. In a recent work entitled *Insanity as a Defence to Crime*, many cases will be found to the same effect on pages 231 to 270 inclusive. An examination of the cases will prove that we have stated the law as favorably to the accused as it can be asked; indeed, the statement is more favorable than the weight of authority warrants.

We are satisfied that our ruling as to the effect and force of the record of the commission which directed the appellant to be sent to the hospital for the insane was right. The only doubt we have is whether such evidence should be admitted at all. The case cited holding such evidence inadmissible is in full harmony with the reasoning in the recent case of *Breedlove v. Bundy*, ante, p. 319. The statutory examination held before the justices and a physician is not an inquisition of lunacy, and the decision of the examiners has none of the qualities of a judgment. The examination is simply a proceeding for the purpose of determining a single question, and that is, whether the person under examination is entitled to admission into the hospital. The decision of the examining commission does not put the person brought before it under guardianship; it requires an essentially different proceeding to do that.

It may be true that when insanity is proved the burden is shifted, but it is not true, even upon the concession that the record of the examining commission is evidence, that it proves insanity in a criminal prosecution, and for this reason, if for no other, the quotation from Ordonaux is not in point.

We are not willing to sanction the doctrine that "a perversion of the affections" constitutes such mental unsoundness as will absolve one from responsibility for crime. We have already cited authorities to prove that such a moral state belongs to a phase of so called moral insanity which the law refuses to recognize as mental incapacity. If it were insanity, then every lover who in a fit of jealousy slays his

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mistress, or every man who is moved to kill another by an impulse arising from fancied wrongs, must go acquit, and this surely is a result not countenanced by principle or authority. To the authorities already cited we now add *State v. Brandon*, 8 Jones Law, 463; *State v. Stickley*, 41 Iowa, 232; *Choice v. State*, 31 Ga. 424; *Spann v. State*, 47 Ga. 549; *People v. Finley*, 38 Mich. 482; *Boswell v. State*, 63 Ala. 307; *Regina v. Haynes*, 1 F. & F. 666; *Regina v. Burton*, 3 F. & F. 772. Our court has recognized the doctrine that there may be a disease of the will power constituting insanity, but no case that we have found carries the so called doctrine of moral insanity any farther.

The tenth charge asked by the appellant does not confine the inquiry to the question whether the accused was laboring under a delusion, but also affirms that if either delusion or "perversion of the affections" impelled him to kill his brother, he was entitled to an acquittal. There can be no mistaking the meaning of this instruction, because the language is, "if, upon the whole evidence, you have a reasonable doubt whether such causes induced the killing of the deceased, you should acquit the defendant." We have heretofore cited authorities to the effect that it is not error to refuse an instruction, unless the party is entitled to have it given in the terms prayed, and we think it clear that the appellant was not entitled to have the instruction given as it was written. Even if that part of it which speaks of "a perversion of the affections" had not been included in its terms, it is extremely doubtful whether it would have stated the law correctly, for it is not every delusion that relieves from criminal responsibility. *Addington v. Wilson*, 5 Ind. 137; *Johnson v. Johnson*, 10 Ind. 387; *State v. Mecherter*, *supra*; *State v. Felter*, 25 Iowa, 67; *Com. v. Rogers*, *supra*; *State v. Gut*, 13 Minn. 341; *Guiteau's Case*, 10 Fed. R. 161, Dr. Wharton's note.

A man can not be absolved from responsibility for crime, no matter how furious his passion, for passion, in legal contemplation, never constitutes insanity. *Guetig v. State*, 66.

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Ind. 94; S. C., 32 Am. R. 99; *Lynch v. Com.*, 77 Pa. St. 205; Lawson Insanity as Defence to Crime, 146.

The court told the jury, and properly, that voluntary drunkenness is no excuse for crime, and told them also that "where *delirium tremens* is set up as a defence, the delirium must exist at the time of the homicide," and this, as an abstract proposition, was undoubtedly correct, and there was, as we think, evidence making it relevant.

We are clear that we were right in holding that the law imposes upon every man the duty of mastering his passions and his appetites, and to the authorities heretofore cited we subjoin this extract from a strongly reasoned opinion, where, in speaking of what is sometimes called *dipsomania*, it was said: "Upon this proposition, however, I plant myself immovably; and from it, nothing can dislodge me but an act of the Legislature, namely: that neither moral nor legal responsibility can be avoided in this way. This is a new principle sought to be engrafted upon criminal jurisprudence. It is neither more nor less than this, that a want of will and conscience to do right, will constitute an excuse for the commission of crime; and that, too, where this deficiency in will and conscience is the result of a long and persevering course of wrongdoing. If this doctrine be true—I speak it with all seriousness—the devil is the most irresponsible being in the universe. * * * * The fact is, responsibility depends upon the possession of will—not the power over it." *Choice v. State*, 31 Ga. 424, 473; Lawson Insanity as Defence to Crime, 549. If, we conclude, there is an undiseased will power, the man who possesses it must exercise it, and can not plead his failure to use what he possesses in common with other persons as an excuse for taking human life. *Flanagan v. People*, *supra*.

We have again read the sixteenth instruction and studied counsel's argument, which is but a repetition of what was said on the former hearing. We are content to take as authoritative the cases cited, and we prefer the statements of an author so justly esteemed as is Seymour D. Thompson to the unsus-

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tained assertions of counsel, and this, too, notwithstanding counsel's criticism.

The instruction approved in *Guetig v. State, supra*, is good law, and is in harmony with the authorities. *Lawson Insanity as Defence to Crime*, 455.

It has been several times decided within twelve months, that the weight of testimony, whether of experts or non-experts, is for the jury, and that it is error for the court to assume to instruct which class is entitled to the greater weight. *Fulwider v. Ingels*, 87 Ind. 414; *Vancaalkenberg v. Vanvaalkenberg*, 90 Ind. 433; *Elliott v. Russell, supra*; *Lawson Expert and Opinion Ev.* 154, 240; *Rogers Expert Testimony*, 58, 60, 61.

The trial court did instruct the jury very plainly that if the appellant was insane, no matter from what cause, he was entitled to an acquittal. Those instructions gave him the benefit of all causes of insanity, and necessarily included insanity from the use of intoxicating liquors, so that he got the benefit of all that is now claimed for him upon the score of diseased mental faculties arising from the use of intoxicating drinks. The instructions fall within the principle laid down in *Harvey v. State*, 40 Ind. 516, and *Sawyer v. State*, 35 Ind. 80. In our former opinion we referred to authorities holding that voluntary drunkenness is no excuse for crime, and that it is only insanity that renders a man mentally incapable of committing crime, and to the authorities heretofore cited we add: *State v. Gut, supra*; *Kriel v. Com.*, 5 Bush, 362; *People v. Garbutt*, 17 Mich. 8; *McKenzie v. State*, 26 Ark. 334; *Bennett v. State*, 2 Mart. & Yerg. 133; *Boswell's Case*, 20 Grat. 860; *State v. Cross*, 27 Mo. 332; *State v. Tatro*, 50 Vt. 483; *State v. Welch*, 21 Minn. 22; *vide auth. cited* 4 Crim. Law Mag. 584 n.

On consultation upon the petition for a rehearing some difference of opinion was developed as to the correctness of the statement in the original opinion that it was not, considered as an abstract question, error to refuse the instruction embodying the statutory definition of mental unsoundness, and

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we have concluded to so far modify the original opinion as to leave that point undecided, and to place our decision, so far as this question is involved, solely on the ground that, even if it were proper to give such an instruction, no substantial error was committed in refusing it in the present instance, because the whole ground of mental unsoundness is covered by the instructions of the court. Our statute provides that "the Supreme Court shall not regard technical errors or defects or exceptions, * * which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant." R. S. 1881, sec. 1891. Where the whole doctrine upon a subject is stated in the instructions of the court, no substantial injury is done the defendant by refusing to give a definition in the language of the statute. Aside from this consideration, the rule, as stated in the original opinion, has always been that where the instruction asked is substantially embodied in those given by the court, there is no error in the refusal.

We can not reverse upon the evidence, for while there is evidence opposing the conclusion reached by the jury, there is much strongly and fully supporting, and long settled rules require us to sustain the verdict in such cases.

Petition overruled.

Filed June 28, 1884.

No. 10,522.

SCOTTEN v. RANDOLPH.

PROMISSORY NOTE.—*Payable in Bank in this State.—Inland Bill of Exchange.*

—Under section 5506, R. S. 1881, a promissory note payable to order or bearer in a bank in this State is negotiable as an inland bill of exchange, and the endorsee of such a note for a valuable consideration, before maturity and without notice, takes the same free from any equities or defences which might exist as between the maker and the payee thereof.

SAME.—*Defences.—Failure of Consideration.—False Representations.—Want of Consideration.—Error.*—In an action by the endorsee against the maker

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of such a note, it is error to sustain a demurrer to a paragraph of answer, alleging facts which show that the consideration of the note had wholly failed before its endorsement, and that the endorsee had knowledge of such facts before the note was endorsed to him; and such error is not rendered harmless because of the fact that issues were joined upon other paragraphs of answer, one alleging that the note was obtained from the maker by certain false and fraudulent representations, and the other averring that the note was executed without any consideration therefor.

PLEADING.—*Written Instrument.*—*Copy.*—Where several paragraphs of a pleading are founded upon the same written instrument, each professing to set out a copy thereof, one copy filed with the pleading is sufficient for all the paragraphs.

PRACTICE.—*Pleading Rejected.*—*Bill of Exceptions.*—*Supreme Court.*—Where a motion to reject or strike out a pleading is sustained, such pleading will constitute no part of the record of the cause on appeal to the Supreme Court, unless it is made so by bill of exceptions or by an order of court.

REHEARING DENIED.—ZOLLARS, J., dissents, and files dissenting opinion.

From the Huntington Circuit Court.

B. M. Cobb and T. G. Smith, for appellant.

J. B. Kenner and J. I. Dille, for appellee.

HOWK, J.—This was a suit by the appellee, as endorsee, against the appellant, as the maker, of a promissory note payable to order, in a bank in this State. In his complaint, the appellee alleged, among other things, that before the maturity of the note he purchased the same, in good faith, of the payee thereof, paying therefor a valuable consideration, and that the note and the interest thereon were due and unpaid. The cause was put at issue and tried by a jury, and a special verdict was returned, in substance, as follows:

“1st. We, the jury, find that the note sued upon was executed by John J. Scotten, November 25th, 1881, in favor of William G. Watkins, and assigned by endorsement to the plaintiff on the 30th of November, 1881.

“2d. And we further find that at the time of the assignment, the plaintiff had no knowledge of any fraud in the transaction, or of any defence against said note.

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"3d. And we further find that at the time of assignment, Randolph did not know what the note was given for, and did not know there was any want of consideration for said note.

"4th. We further find that said note was assigned before it was due, and for a valuable consideration.

"5th. If, upon the facts, the law is with the plaintiff, then we find for the plaintiff, and assess his damages at the sum of three hundred and seventy-six dollars. And if the law is with the defendant, then we find for the defendant."

Upon the foregoing special verdict, the court rendered judgment for the appellee, the plaintiff below, for the amount found due on the note in suit. The appellant excepted to the judgment, and, his motion for a new trial having been overruled, he has appealed from such judgment to this court.

The first error complained of, in argument, by the appellant's counsel, is the overruling of his motion for an order requiring the appellee to answer more fully certain interrogatories, filed with appellant's answer, as requested in such motion. The appellant's motion for such an order was a motion in relation to collateral matters, and, under the provisions of section 650, R. S. 1881, it did not constitute a part of the record, unless made so either by a bill of exceptions or by an order of the court. In this case, the appellant's motion was not made a part of the record in either of the modes prescribed by the statute. It follows, therefore, that the appellant's motion and the ruling of the court thereon were not properly saved in the record, and the error complained of presents no question for our decision.

Appellant's counsel next insist that the trial court erred in sustaining appellee's demurrer to the fourth paragraph of appellant's answer. In this fourth paragraph of answer, the appellant alleged, in substance, that the consideration for which the note in suit was given had wholly failed, in this, that the payee of the note, William G. Watkins, was engaged in the marriage-dowry insurance business, and that the

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only consideration agreed upon by the payee and appellant for the note was that the Allen County Marriage Benefit Association should issue and deliver to appellant a certificate for one hundred and twenty shares of stock, within thirty days from the date of such note, as shown by "Exhibit A," filed with and made part of said paragraph of answer; that no such certificate was so issued by said association, or delivered to appellant, and that appellee had knowledge thereof before he received the note in suit. Wherefore, etc.

"Exhibit A," which is filed with and made part of the fourth paragraph of answer, is in the words and figures following, to wit: "Receipt for application and payment of first assessment on stock. Huntington, Ind., November 20th, A. D. 1881. Received of J. J. Scotten an application and the sum of 360 dollars, being first assessment on 120 shares of benefit stock in the Allen County Marriage-Benefit Association, of Fort Wayne, Ind. It is agreed and understood that should said association neglect or fail to issue a certificate therefor within thirty days from the date of receiving application, the amount herein named shall be returned to said applicant. Applicant will please notify the secretary should the certificate not be received within thirty days from date thereof. (Signed) WM. G. WATKINS, Agent."

We are of the opinion that the court erred in sustaining appellee's demurrer to the fourth paragraph of appellant's answer. Upon the facts alleged therein, if they are true, and the demurrer admits their truth, it is clear that the consideration of the note in suit, if it ever had any legal consideration, had wholly failed at the time and before the appellee received the same, of which failure he then had knowledge. It is true that the note in suit, under the provisions of section 5506, R. S. 1881, in force since July 5th, 1861, was negotiable as an inland bill of exchange, and that the payee and endorsee thereof might recover, as in case of such bills. It is true, also, that the purchaser and endorsee for a valuable consid-

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eration, before maturity and without notice, of such a note as the one in suit, will take such note free from any equities or defences which might exist as between the maker and payee thereof. *Murphy v. Lucas*, 58 Ind. 360; *Zook v. Simonson*, 72 Ind. 83; *Ruddell v. Fhalor*, 72 Ind. 533 (37 Am. R. 177); *Coffing v. Hardy*, 86 Ind. 369.

It is certain, we think, that the facts stated in the fourth paragraph of answer would have constituted a complete defence to any suit on the note by Watkins, the payee thereof. When it was alleged that the appellee, as endorsee of Watkins, before he received the note in suit, had knowledge of the facts constituting the appellant's defence to any action brought by Watkins, the payee of the note, the paragraph of answer became a good defence to appellee's suit on the note. But the appellee's counsel say that the paragraph was bad, because "the complaint alleges that the note was endorsed to appellee for a valuable consideration, before maturity, and in *good faith*." Counsel italicize the words "*good faith*;" but the averment that the note was endorsed in *good faith* is hardly the averment of a fact. It is, as it seems to us, the averment of a conclusion which the law might, or might not, draw from the facts attendant upon the endorsement of the note. If the appellee had received the note, as its endorsee, in the ordinary course of business, for value, before maturity and without notice of any equities or defences existing between the maker and the payee thereof, the legal conclusion from these facts would be that the appellee was the holder of the note in good faith. Under the civil code facts must be pleaded and not conclusions of law. Section 338, R. S. 1881. Besides, it can not be said, we think, that the averment of "*good faith*" is equivalent to the averment that the endorsee took the note without notice of the maker's defences.

It is claimed by appellee's counsel that "this paragraph is bad and might have been struck out, for the further reason that the same defence was raised by the second and third par-

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agraphs." In this position we think counsel are mistaken. The substance of the second paragraph of answer was that the note in suit was obtained from appellant by certain false and fraudulent representations; and in the third paragraph it was alleged that the note was executed without any consideration therefor. The fourth paragraph of answer, as we have seen, stated as a defence to the suit that the consideration of the note had wholly failed. We can not hold, therefore, that the error of the court in sustaining the demurrer to the fourth paragraph of answer was a harmless error, or that the appellant was not injured thereby; because it is clear that evidence which would have fully sustained the fourth paragraph might have wholly failed to sustain the allegations of either the second or third paragraph of the answer.

"Finally," appellee's counsel say, "the fourth paragraph of answer was bad, for the reason that the plea refers to and makes a certain paper an exhibit which was not filed with the paragraph." A copy of the same paper, as "Exhibit A," was filed with and made part of the second paragraph of answer, and appears in the record immediately following the third paragraph of answer. The same copy of the same paper, by the same description, was made part of the fourth paragraph; but only one copy appears in the record. Upon the point now made by appellee's counsel, in *Maxwell v. Brooks*, 54 Ind. 98, this court said: "Where more paragraphs than one are based upon a written instrument, each professing to set out a copy, one copy is sufficient. To require more would subserve no good purpose, but would unnecessarily increase expense and encumber the record."

The demurrer to the fourth paragraph of answer ought to have been overruled.

Appellant's counsel also complain of the decision of the court in sustaining appellee's motion to strike out his cross complaint. The record fails to show that either the motion or the cross complaint was made part thereof by a bill of

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exceptions or by an order of the court. Where a pleading or a part thereof is struck out below, it will thereafter constitute no part of the record of the cause unless it is made a part thereof by a bill of exceptions or by an order of court. This rule is settled by many decisions of this court. *School Town of Princeton v. Gebhart*, 61 Ind. 187; *Berlin v. Oglesbee*, 65 Ind. 308; *Peck v. Board, etc.*, 87 Ind. 221. The error, therefore, if it be such, is not properly saved in the record, and is not considered.

The other errors complained of arise under the alleged error of the court in overruling the motion for a new trial, and as they may not occur again, we need not now consider them.

The judgment is reversed, with costs, and the cause remanded, with instructions to overrule the demurrer to the fourth paragraph of answer, etc.

Filed Oct. 31, 1883. Petition for a rehearing overruled June 21, 1884.

DISSENTING OPINION ON PETITION FOR A REHEARING.

ZOLLARS, J.—Upon a more careful examination of the record, I am satisfied that the petition for a rehearing ought to be granted.

It may be admitted that the fourth paragraph of answer states sufficient facts to withstand the demurrer, and, that there was technical error in sustaining the demurrer thereto. Yet the error, as I regard it, was entirely harmless to appellant. Our duty in such cases is clearly fixed by the statute and repeated decisions of this court.

The statute provides that "No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance, or imperfections contained in the record; pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court

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that the merits of the cause have been fairly tried and determined in the court below." Section 658, R. S. 1881.

It has often been held by this court, as was held in the case of *Traylor v. Dykins*, 91 Ind. 229, that "A judgment will not be reversed by the Supreme Court, for an error in sustaining a demurrer to a paragraph of answer, when it appears that all the evidence, admissible under such paragraph, is also admissible under another paragraph of answer remaining in the record. Such an error is a harmless one." *Wolf v. Schofield*, 38 Ind. 175; *Works Pr.*, section 537, and cases cited; *Rowe v. Major*, 92 Ind. 206; *Heshion v. Julian*, 82 Ind. 576. Let us apply the rule of the statute, and the cases, to the case before us.

The answer consisted of a general denial and three affirmative pleas. A demurrer was overruled to the second and third, and sustained to the fourth. For the alleged error in sustaining the demurrer to the fourth the judgment was reversed. This answer is as follows: "The defendant, for further answer to plaintiff's complaint, says the consideration for which said note was executed has wholly failed in this, to wit, that the payee of said note * * * was engaged in the marriage-dowry insurance business, and the only consideration agreed upon by said payee and this defendant, for said note, was that the Allen County Marriage Benefit Association should issue and deliver to defendant, a certificate for one hundred and twenty shares of stock therein, within thirty days from date of said note, as shown by 'Exhibit A,' filed as a part hereof; that no certificate was so issued by said association, nor delivered to defendant, and that plaintiff had knowledge thereof before he received said note. Wherefore defendant demands judgment for his costs, and other proper relief."

The second answer, after many averments as to the representations made and means used to induce appellant to execute the note, refers to the exhibit filed with it, which is the

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same as that referred to in the fourth answer. The exhibit is set out in full in the opinion.

Following the reference to the exhibit, it is averred further as follows: "And at the time said receipt was so executed, it was agreed by, and in it expressed, that in the event that said association neglected or failed to issue a certificate upon said application herein mentioned, within thirty days thereafter, then the note so signed by defendant, in lieu of money paid, as therein set out, was to be returned to him, and its delivery and execution was not to be absolute until he received such shares of stock, all of which plaintiff well knew. * * * And defendant further avers that said association never issued said stock, or any part thereof, nor delivered the same to defendant, but before the expiration of the thirty days aforesaid, said pretended association had surrendered all its franchises, or pretended franchises, and entirely disbanded and ceased to exist," etc.

It will be noticed that this answer refers to the same exhibit as the fourth, and the averments in relation to the consideration, the promise of the stock and the failure to deliver it, are substantially the same as in the fourth answer. Every fact set up in the fourth answer was clearly admissible under the second; if one shows a failure of consideration, clearly the other does. Each was pleaded as a bar to the action. The only possible distinction that can be made is, that in the fourth answer it is styled as a plea of failure of consideration, while the second is pleaded generally as a defence to the action. The code requires that the facts shall be stated in a pleading. When these are stated, the plea will be judged by the facts so stated, and not by what the plea may be styled. The facts stated in the fourth answer being admissible under the second, the sustaining of the demurrer to the fourth was, under the authorities above cited, a harmless error.

If, therefore, appellant did not introduce proof of those facts, if he had any, it was clearly his own fault. It may be

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observed in passing that it is very apparent from the special verdict of the jury that appellant was allowed to introduce his evidence in support of the facts set up in the answers; and, more than this, appellant's testimony, with the testimony of the other witnesses, is in the record. Appellant was allowed to and did testify fully, and detailed the whole transaction; identified the exhibit filed with the answers, which was read in evidence, and stated that he had never received the certificate of stock. It is very apparent that he stated all that he could state, or could have stated, had the fourth answer been in.

The error in sustaining the demurrer was a harmless error for another reason, and that is, that in no possible way could the result have been different. The note was commercial paper, as stated in the opinion; hence, if appellee was an innocent purchaser, for value, before maturity, his right to recover would not in any way be affected by the defence set up in the fourth answer. It is averred in the second answer that he was not such innocent purchaser. Appellant was allowed to introduce his evidence to prove that averment. In that he failed, as the jury found in the special verdict that he was an innocent purchaser, for value, and before maturity. That finding in this case is conclusive. This court has no right to assume or presume that by another trial appellant can produce a different result as to that fact, and it will not reverse the judgment to give him the opportunity of attempting it. It should rather be presumed that upon another trial the jury would again find that appellee was an innocent purchaser. Why, then, reverse the judgment to let in a defence which in no possible event could be a defence against appellee's right to recover?

It has recently been held by this court that the exclusion of proper evidence, which could not have changed the result, is a harmless error. *Bunnell v. Studebaker*, 88 Ind. 338.

So, too, it has been held that the overruling of a demurrer

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to a bad answer is a harmless error when it appears by the answers of the jury to interrogatories that the verdict was found against the plaintiff upon other issues. *Olds v. Mod-erwell*, 87 Ind. 582. So, it has been held that a judgment which is clearly right upon the evidence will not be reversed because erroneous instructions may have been given. *Mand v. Trail*, 92 Ind. 521. See, also, *Wright v. McLarinan*, 92 Ind. 103. And so, the sustaining of a demurrer to an answer, when the finding of the jury shows that the facts therein set up could not affect the plaintiff's right of recovery, should be held to be harmless.

It may be hard for appellant to pay the note, having received no valuable consideration; so, too, it would be a hardship upon appellee to lose the money which in good faith he paid for the note. He had no knowledge of any defence to the note, and can not possibly be charged with any wrong or negligence in its purchase. As between him and appellant, appellant is in the wrong. By his negligence or stupidity the note was executed; it was commercial paper; appellee had the right to and did buy it in good faith. If either party should lose, it should be appellant, who made the loss possible.

Filed June 21, 1884.

No. 11,755.

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CRIMINAL LAW.—*Fornication.*—*Adultery.*—*Indictment.*—An indictment, charging that at, etc., on, etc., C, a married man and B, an unmarried woman, said C. and B. not being then and there married to each other, did unlawfully live and cohabit together as man and wife, is good under section 1991, R. S. 1881.

From the Monroe Circuit Court.

F. T. Hord, Attorney General, and *J. E. Henley*, for the State.

J. H. Loudon and *R. W. Miers*, for appellees.

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ELLIOTT, C. J.—The court below sustained appellee's motion to quash the indictment, and the State appeals.

The charging part of the indictment reads as follows: "One William Chandler, late of said county, on the 14th day of August, A. D. 1883, and on divers other days and times, as well before as after that date, and previous to this presentment, at said county and State aforesaid, being a married man and having a lawful wife then living, and Grace Beeman, at the time being unmarried, and Grace Beeman and said Chandler, not being married to each other, did then and there during said time unlawfully live and cohabit together as man and wife." The statute on which the prosecution is based reads thus: "Whoever cohabits with another in a state of adultery or fornication shall be fined in any sum not exceeding five hundred dollars, and imprisoned in the county jail not exceeding six months." The objection to the indictment is that it does not charge that the defendant and Grace Beeman lived together in a state of fornication or in a state of adultery.

It has been many times decided that the general rule is that if the offence is charged either in the language of the statute, or in language of like import and equivalent meaning, the indictment will be held good. In the present case the language used is not that of the statute, and the question is whether that employed is equivalent to that found in the statute.

The term *cohabit* has not such a broad and certain meaning as that annexed to it by the State. The word is not one of a certain meaning, for the lexicographers define it to mean "to dwell with another in the same place;" "to live together as husband and wife." Worcester's Dict.; Webster's Dict. Bouvier says: "The word does not include, in its signification, necessarily, the occupying the same bed; 1 Haag. Cons. 144; 4 Paige Ch. 425; though the word is popularly, and sometimes in statutes, used in this latter sense; 20 Mo. 210; Bishop Mar. and Div., section 506, n. * * * Used with-

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out reference to the relation of the parties to each other as husband and wife, or otherwise." The word, considered apart from the words with which it is associated, can not, then, be taken as equivalent to the language of the statute, for it can not be inferred from the use of the word that the parties were guilty of adultery or fornication. The statute itself employs the word in the sense of living together, but does not annex to it the signification claimed. The word as used in the statute does not signify a state of adultery or fornication, for the words with which it is associated forbid such an interpretation. The rule is that every word of a statute shall be given force unless in so doing violence is done to the intention of the Legislature.

It is, however, contended that the words "as man and wife," give to the word cohabit a meaning equivalent to that conveyed by the words "in a state of fornication." We are inclined to think that this contention should prevail. The word "cohabit" is, as we have seen, a word susceptible of meaning a dwelling together as husband and wife, and we think that the language with which it is associated in the indictment does give it this meaning. If the word "cohabit" had a fixed and definite meaning, it might be that a different rule would prevail, but it is capable of two or more meanings, and one meaning of which it is susceptible is that which the words with which it is associated assign to it, namely, living together as husband and wife.

Taking the whole indictment into consideration, we think it charges the offence of cohabiting in a state of fornication.

The rule in this State is that sexual intercourse between a man, whether married or not, and an unmarried woman, is fornication. *Hood v. State*, 56 Ind. 263 (26 Am. R. 21). The relation and status of the appellant and Grace Beeman are shown, and as a conclusion of law the court can adjudge that sexual intercourse between them constituted fornication.

The indictment is in form like a precedent given in a work
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on criminal law, and the reasoning in one of our cases goes far to sustain it. Moore Crim. Law, section 609; *State v. Johnson*, 69 Ind. 85. Judgment reversed.

Filed June 28, 1884.

 No. 11,130.

McCARTY, ADMINISTRATOR, v. WATERMAN.

PRACTICE.—*Striking out Testimony.*—*Overruling Motion.*—*Error.*—There is no error in overruling the plaintiff's motion to strike out the entire testimony of a witness, of which he can be heard to complain, when it appears that he elicited and introduced much of the testimony of such witness. His motion was too comprehensive.

SAME.—*Instructions.*—Where all the instructions contain a fair and correct statement of the law applicable to the issues and the evidence, and are not calculated to mislead, the judgment will not be reversed thereon, even though one of them, standing alone, might seem to be erroneous.

SAME.—*Weight of Evidence.*—*Supreme Court.*—The verdict will not be disturbed by the Supreme Court on the mere weight of the evidence.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and W. R. Fertig, for appellant.

D. Moss, R. R. Stephenson and H. A. Lee, for appellee.

Howk, J.—This is the second time this cause has been before this court. When it was first here, the opinion and judgment of this court are reported under the title of *McCarty v. Waterman*, 84 Ind. 550.

The suit was brought by the appellant, as the administrator of the estate of Abraham Waterman, deceased, against the appellee a son of the decedent, as an executor *de son tort* of such estate. The appellee answered by a general denial of the appellant's complaint. On the former appeal, this court held, in substance, that the trial court had erred in admitting in evidence, over the appellant's objection, a certain written instrument executed by and between the decedent, in

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his lifetime, and the appellee, upon the ground that such instrument, in so far as the decedent was concerned, was testamentary in its nature, and, not having been attested by two subscribing witnesses, was void and inoperative for any purpose. For this error, the judgment below was then reversed and the cause remanded for a new trial.

Without any material change in the pleadings or issues, the cause was again tried by a jury, and a verdict was again returned for the appellee, the defendant below. Over the appellant's motion for a new trial, judgment was rendered against him for the appellee's costs.

Error is assigned here by the appellant, which calls in question the decision of the circuit court in overruling his motion for a new trial.

We will consider and pass upon the several reasons for a new trial, insisted upon in argument on behalf of the appellant, in the inverse order in which his counsel have discussed them. After one Silas Helms, a witness for the appellee, had testified fully in the cause, on his direct and cross-examination, the appellant's counsel moved the court "to order the testimony of this witness struck from the record, for the reason that the written contract referred to is the best evidence of what the contract was, and for the reason that the testimony is incompetent, irrelevant and immaterial, and for the further reason that his testimony shows, if there was any contract, it relates to the disposition of his property after his death." To this motion, as shown by the bill of exceptions, the court responded as follows: "All that pertains to the contract is not competent; all the conversation he refers to with the old gentleman, in reference to having turned over property to this defendant, is proper." The appellant seems to have regarded what the court thus said, as an overruling of his motion to strike out the testimony of the witness, Helms; for he excepted to it as such ruling and assigned it as cause for a new trial, in his motion therefor. It seems to us, how-

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ever, that the court actually sustained so much of the appellant's motion to strike out as he had assigned even an apparently sufficient reason for. He can not be permitted to treat what the court said as an overruling of his motion, and claim thereon that the court erred in overruling his motion for a new trial. Besides, the court would have been justified, we think, if it had overruled in express terms the appellant's motion to strike out the testimony of Helms, for the reason that the motion was entirely too broad. Much of such testimony was elicited by the appellant's own questions to the witness, and surely he had no right to ask that this testimony should be struck out, nor to complain of the court's refusal to strike it out.

Appellant's counsel also claim that the trial court erred in giving the jury, at the appellee's request, the following instruction: "A written contract can be changed or modified by a subsequent parol agreement, and such modification or change may be proven by the declarations of the parties thereto; and any declarations or statements, if any, made by the old gentleman in his lifetime, in relation to the disposition of his property, can be considered by you in determining whether the written contract was changed or modified, or not."

In discussing the alleged error of the court, in giving this instruction, the appellant's counsel first dissect and separate it into what they call "three, distinct propositions." They then attack each one of these propositions separately, and reach the conclusion that each of them, separately considered, is erroneous. The court gave the jury, of its own motion, two instructions, and two at the appellant's request, and two others at the appellee's request, besides the one above quoted. It is well settled by the decisions of this court, that the instructions of the court to a jury ought to and must be construed with reference to each other, and as an entirety; and if the instructions, thus construed, present the law cor-

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rectly and are not calculated to mislead the jury, the judgment will not be reversed thereon. *Eggleston v. Castle*, 42 Ind. 531; *Kirland v. State*, 43 Ind. 146 (13 Am. R. 386); *McCulley v. State*, 62 Ind. 428. Applying this doctrine to the case in hand, we have no difficulty in reaching the conclusion that there is no such error, in the instruction above quoted, as will authorize or justify the reversal of the judgment below.

One other question is discussed by the appellant's counsel, in their elaborate brief of this cause, and that is the alleged insufficiency of the evidence to sustain the verdict. There is legal evidence, appearing in the record, which tends to sustain the verdict on every material point. In such a case, this court will not attempt to weigh the evidence or to determine its preponderance. The reasons for this rule of practice have been so often given, in the decisions of this court, they need not be repeated here. *Cornelius v. Coughlin*, 86 Ind. 461, and cases cited.

The motion for a new trial was correctly overruled.

The judgment is affirmed, with costs.

Filed June 28, 1884.

No. 11,768.

MORRIS, AUDITOR, v. THE STATE, EX REL. BROWN, CLERK.

COUNTY AUDITOR.—*Clothing for Insane.*—*Allowance by County Commissioners.*

—*Statute Construed.*—*Repeal of Statute.*—When clothing has been purchased in good faith by the clerk for an insane person, as directed by section 2856, R. S. 1881, it is the duty of the county auditor to draw a warrant for the amount thereof upon the clerk's certificate, and it is not necessary that the claim shall be presented for allowance to the board of commissioners. This statute, inasmuch as it relates to a special subject, is not repealed by subsequent general statutes requiring claims to be presented for allowance to the board.

From the Henry Circuit Court.

J. H. Mellett and *E. H. Bundy*, for appellant.

F. W. Fitzhugh, for appellee.

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ELLIOTT, C. J.—The relator is the clerk of Henry county, and sued out a writ of mandamus to compel the appellant, the auditor of that county, to issue a warrant for forty-eight dollars for money expended for the purchase of clothing for an insane man, at the time an inmate of the hospital for the insane. The purchase was made by the clerk upon the requisition of the superintendent of the hospital.

The ruling question in the case is this: Is the county auditor bound to issue his warrant upon a claim of the character described, without its having been presented to and allowed by the board of county commissioners?

It is decided in *Pfaff v. State, ex rel.*, 94 Ind. 529, that where there is no specific provision for the auditing of claims, they must be presented to and allowed by the commissioners, and that unless allowed by that body the auditor is not bound to draw his warrant for them. The general rule, therefore, is that all claims must be presented to the commissioners for allowance, and the exceptions to the rule are the cases in which a specific duty to allow and audit claims is by law imposed upon the auditor. Whether the clerk had a right to the writ sued for must, therefore, depend upon whether the claim described is one specifically provided for by law.

In our opinion the present case is an exception to the general rule. Our reason for this conclusion is that the statute makes it the duty of the clerk to purchase clothing for an insane person, and imposes upon the auditor the duty of auditing the claim upon the certificate of the clerk. R. S. 1881, section 2856. The statutory provision is, that "payment for the same" (that is, for clothing purchased by the clerk) "shall be made out of the county treasury, upon certificate of the clerk and order of the county auditor." It is evident that the Legislature intended that the certificate of the clerk should be sufficient evidence of the claim, and when that evidence was presented the duty to issue the necessary warrant became purely a ministerial one.

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The statute enjoins upon the clerk the duty of buying the clothing, and entrusts him with full authority in the matter, and does not authorize the commissioners to buy the clothing. As the clerk is the officer having authority in such matters, it clearly follows that his approval and certificate of the claim settles it definitely as to character and amount, and leaves nothing for the commissioners to pass judgment on.

It was competent for the Legislature to take from the commissioners authority in such matters and vest it in some other county officer, and to make his certificate evidence of the validity of the claim. This power has been exercised by the Legislature, and it was made the specific duty of the auditor to accept and act upon the certificate of the clerk. Of course, if fraud or mistake were shown a different rule would obtain, for in such cases the auditor might refuse to issue his warrant, but there is no pretence of anything of the kind here.

The right of the clerk to a warrant is not, in the sense in which the word is used in *Pfaff v. State, ex rel., supra*, a claim against the county, but is a right vested in the clerk by a positive statute. When he does what the statute directs, he is entitled to a warrant, and the law makes his certificate sufficient evidence of this right. There is, therefore, no need for further inquiry, by any of the county officers, nor is there any authority to make such inquiry, for the statute prescribes exactly what shall be done. While the right of the clerk is in a broad sense a claim, it is not such a claim as is within the general rule laid down in *Pfaff v. State, ex rel., supra*. It is a statutory right expressly fixed by statute, and governed by the statute fixing it as to character and mode of procedure.

Any other conclusion than that reached by us would conflict with the settled general rule that where a discretion is confided to a public officer, courts can not interfere with its exercise, although they may restrain or correct its abuse. The evil of a departure from this rule is illustrated by the case before us. Suppose the clerk to buy clothing at a cost

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of twenty-five dollars, that he acts in good faith, and that the commissioners cut down the claim to five dollars, must the clerk lose the difference between the price actually paid and the sum allowed? We know of no rule of law which will compel an officer, who has performed his duty in good faith, and has exercised a discretionary power vested in him, to suffer loss because other officers may conclude that he did not wisely exercise his discretion. If the officer had no discretion, or if he could not act without having been directed by the commissioners, a very different rule would prevail, but the case before us is one where the whole matter is entrusted to the sole authority of the officer, and no consultation is required to be had with, or any directions taken from, any other officer.

The statute prescribing the duties of clerks in furnishing clothing to insane persons is a special one, governing a special subject. It takes from the commissioners authority respecting the subject and confers it upon the clerk, and prescribes special powers and duties and establishes a special method of procedure. Special statutes governing special subjects are not necessarily repealed by general statutes, and we do not think the statute cited in *Pfaff v. State, ex rel., supra*, was intended to repeal the special statute under discussion, but that it remains in force governing the special subject upon which it operates.

We fully approve the decision in *Pfaff v. State, ex rel., supra*, but hold that the case at bar is a special case arising out of a special statute, and forming an exception to the general rule, because it is a special case arising out of a special statute operating upon a special subject.

Judgment affirmed.

Filed June 28, 1884.

Gillette v. Hill.

No. 10,766.

GILLETTE v. HILL.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.*R. M. Johnson, H. C. Dodge, O. Z. Hubbell and E. G. Herr*, for appellee.

FRANKLIN, C.—The questions presented in this case grow out of the same transaction, and are substantially the same as those discussed and decided in the case of *Hill v. Hazen*, 93 Ind. 109.

Upon the authority of that case the judgment in this case must be affirmed.

PER CURIAM.—It is therefore ordered that the judgment of the court below be and it is in all things affirmed with costs.

Filed Feb. 1, 1884.

PETITION FOR A REHEARING.

FRANKLIN, C.—The judgment in this case was affirmed upon the authority of the case of *Hill v. Hazen*, 93 Ind. 109, without any extended opinion in the case. To which we think appellant's counsel, in his brief on his petition for a rehearing, indulges in unwarranted criticisms. We think it unprofitable to copy them or answer them.

This suit was commenced August 18th, 1881. The facts in this case, as gathered from the special findings of the court in the case, are as follows: On the 4th day of February, 1881, *Hazen, et al.*, recovered a judgment in the court of the city of Elkhart for the sum of \$504.01 against Daniel Hill and Warren Hill. On the 27th day of July, 1881, execution was issued on the same, and came into the hands of appellant as sheriff; that on August 1st, 1881, the sheriff demanded property of Daniel Hill to satisfy the execution, and threatened to seize and take possession of said appellee's goods unless he paid the same; that said appellee, to avoid said seizure, paid to appellant as such sheriff the amount due on said execution, said payment being made under protest and objection by appellee, on the alleged grounds that the judgment was not valid, that the execution was void, that he did not justly owe the debt, and that he would attempt to recover back the money; that on the second day of August, 1881, appellee and Warren Hill commenced proceedings against said sheriff to restrain and enjoin him from paying said money to *Hazen et al.*, and for an order that he pay the money back to appellee. *Hazen et al.* were made parties thereto, and an order was issued on the 3d day of August, 1881, and then served upon said sheriff, restraining him from paying over said money to said *Hazen*; that said court, on the 13th day of August, 1881, sustained said proceedings, and ordered the execution to be recalled and annulled, and ordered the said sheriff to pay back the money so collected by him on the said execution, and return the writ; that on the 11th day of August, 1881, appellant paid said money over to said *Hazen*, and returned the execution satisfied, and took from said *Hazen* an indemnifying bond, securing him against loss by reason of so doing; that before the commencement of this action to recover said money, and after the sheriff had received the same, appellee demanded the money of the sheriff, who refused to pay it to him.

Upon which finding the court stated the following conclusion of law: "That the plaintiff is entitled to recover of the defendant the sum of

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money so paid, with interest from the date of the payment." To which defendant excepted. An appeal was taken to this court from the judgment declaring the execution void, and ordering the money paid back to appellee. In that appeal this court decided the invalidity of the original judgment and the voidness of the execution, and affirmed the judgment ordering the money paid back to appellee. The only error assigned in this case is alleged error in the conclusion of law.

We think the affirmance of the judgment in that case fully settles the legal question involved in this case, and there was no error in the conclusion of law.

PER CURIAM.—The petition for a rehearing is overruled, at appellant's costs.

Filed May 8, 1884. Petition for a rehearing overruled June 19, 1884.

No. 10,563.

KEEN, ADMINISTRATOR, v. BRECKENRIDGE.

From the Dearborn Circuit Court.

R. E. Slater, F. Adkinson, A. W. Gaines and O. M. Wilson, for appellant.

Howk, J.—The questions in this case are the same, and presented in the same way, as those which were considered and decided by this court at the present term, in *Keen v. Breckenridge*, ante, p. 69. Upon the authority of the case cited, and for the reasons there given, we must hold that the court committed no error, in the case at bar, in sustaining the appellee's demurrers to the several paragraphs of appellant's complaint.

The judgment is affirmed, with costs.

Filed June 7, 1884.

No. 11,290.

LIST ET AL. v. KENNEDY.

From the Johnson Circuit Court.

J. H. Jordan, G. W. Grubbs, G. H. Adams, L. Ferguson, W. R. Harrison and W. E. McCord, for appellants.

J. V. Mitchell, J. F. Cox, J. E. McDonald, J. M. Butler and A. L. Mason, for appellee.

BLACK, C.—The questions involved in this case are the same as those decided in *List v. Padgett*, ante, p. 126, and, upon the authority of that case, the judgment should be affirmed.

PER CURIAM.—The judgment is affirmed, at the costs of the appellants. Filed June 4, 1884.

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See COSTS.

AUDITOR OF STATE.

1. *Auditor of State's Fees*.—*Public Officer*.—*Insurance Law of March 3d, 1877*.—*Duties of Auditor*.—*Statute Construed*.—Fees are compensation given by law to public officers for official services rendered to individuals. The insurance law of March 3d, 1877, imposed the discharge of new and additional duties upon the auditor of state in relation to foreign insurance companies doing business in this State, and authorized such auditor to charge and collect, for his services in the discharge of such duties, certain new and additional fees; and as the law did not provide for the application of such fees, when imposed and collected, in any different way or to any different purpose, they became and were the property of the auditor of state.
Henderson v. State, ex rel., 437
2. *Same*.—*Act of March 24th, 1879*.—*Retroactive or Prospective Legislation*.—*Statutory Construction*.—It is a maxim of the law that statutes must be construed prospectively, unless their language plainly imports a different intention on the part of the Legislature. The act of March 24th, 1879 (section 5627, R. S. 1881), which requires the auditor of state to pay into the state treasury a specified percentage of all fees by him collected in the insurance and land departments of his office, is not retroactive in its terms, but was manifestly intended to be prospective in its effect and operation.
Id.

BAILIFF.

See CRIMINAL LAW, 1.

BASTARDY.

1. *Civil Action.—Appeal to Supreme Court.*—A prosecution in bastardy is a civil action, and is governed by the provisions of the civil code in all respects not provided for in the act regulating such prosecutions; and, therefore, an appeal may be taken to the Supreme Court from the judgment of the circuit court in a prosecution in bastardy, in either of the modes provided for taking such an appeal in a civil action, and the fact that an appeal was prayed for, in one of these modes, is no ground for the dismissal of an appeal actually taken in one of the other modes. *Powell v. State, ex rel., 108*
2. *Same.—Continuance.—Error.*—It is error to refuse the defendant a continuance, in a prosecution for bastardy, upon a sufficient application therefor, on the ground of absent witnesses. *Id.*

BILL OF EXCEPTIONS.

See CRIMINAL LAW, 15; PARTITION, 1; SUPREME COURT, 11, 16, 25, 28, 32.

BOARD OF COUNTY COMMISSIONERS.

See COUNTY COMMISSIONERS.

BOARD OF HEALTH.

See COUNTY COMMISSIONERS, 2, 3.

BOND.

See COUNTY COMMISSIONERS, 1; COUNTY RECORDER; DECEDENTS' ESTATES, 3; REPLEVIN, 1.

BONDS.

See COUNTY TREASURER.

BRIBERY.

See CRIMINAL LAW, 14, 25.

BRIDGES.

See NEGLIGENCE, 1 to 4, 8.

BRIEF.

See SUPREME COURT, 7, 8.

BUILDING ASSOCIATION.

See MORTGAGE, 6.

BURDEN OF PROOF.

See NEGLIGENCE, 16; SALE, 4.

CHANGE OF VENUE.

Presumption of Consent.—An applicant for a change of venue filed affidavits that he could not have an impartial trial in the county, and that many of the witnesses lived in C. county, in an adjoining circuit; whereupon the other party filed an affidavit showing that he could not have a fair trial in that county, and thereupon the venue was without objection changed to another county, not in an adjoining circuit.

Held, that it would be presumed that the cause was sent to that county by agreement, and, therefore, objection to proceeding in that court should be overruled. *Newman v. Hazelrigg, 73*

CITY.

1. *Negligence.—Co-servants.*—The rule that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant is not applicable to a suit against a municipal corporation.

Turner v. Indianapolis, 51

2. *Same.—Streets.*—A fireman, in assuming the duties of his place, takes upon himself no risk arising out of negligence on the part of those in charge of the streets. *Ib.*
3. *Same.—Complaint.—Notice.*—In a complaint against a city for an injury caused by an obstruction in a street, it is not enough to allege that the city had negligently left the obstruction in the street, but it must also appear that it had notice of the obstruction, or that it ought to have had such notice. *Ib.*
4. *Annexation of Territory.—Jurisdiction.—Collateral Attack.*—A complaint to enjoin a city from exercising jurisdiction over territory annexed claimed that the proceedings to annex were void: 1. Because the petition for annexation prayed for the annexation of other lands also, which the county board refused to annex; 2. Because no notice of the intention to present the petition was given by publication for thirty days.
Held, that the complaint did not show that the board had not jurisdiction of the proceedings, and therefore the annexation could not be attacked collaterally. *Terre Haute v. Beach, 143*
5. *Same.—County Commissioners.—Defective Notice.*—Where there is some notice, of a legal form, and that notice is adjudged sufficient, the proceeding is not void, although the notice may be defective. *Ib.*
6. *Street Improvements.—Estimates.—Mandate.—Parties.*—Mandate lies against a city as a corporation at the suit of a contractor, to compel the making of correct estimates of work done by him in the improvement of its streets, according to the terms of his contract, so far as the same may be chargeable to abutting real estate, and neither the city engineer nor any other city officer is a necessary party.
Wren v. Indianapolis, 206
7. *Same.—Letting of Contract.—Ordinance.—Complaint.*—In such case the city can not object, on demurrer, to the complaint, that it does not show that the letting of the work was properly advertised, or that a grade was fixed by the ordinance providing for the improvement, or that the work was not finished according to contract, the city's fault preventing; and where it is averred that the ordinance was passed by a unanimous vote of the council, it is not necessary, in view of the statute, R. S. 1881, section 3164, to allege that there was a petition therefor. *Ib.*
8. *Drainage.—Streets.—Liability for Injury by Water.*—If a city, by the use of a culvert not constructed by it, damage a citizen by reason of discharging the drainage of its streets upon his lot, it is liable.
Crawfordsville v. Bond, 236
9. *Same.—Surface Water.*—If a city, by its system of street improvement and drainage, collect a large body of surface water in one place, it must then provide for its escape without injury to private property, or answer in damages. *Ib.*

COLLATERAL ATTACK.

See CITY, 4, 5; COUNTY COMMISSIONERS, 4.

COMMON CARRIER.

See NEGLIGENCE, 10 to 16.

COMMON LAW.

See CRIMINAL LAW, 24

CONFISCATION.

See JUDGMENT, 5, 6.

CONSIDERATION.

See EVIDENCE, 12; EXECUTION, 7; FRAUDULENT CONVEYANCE, 2, 3;
MARRIED WOMAN, 1; PROMISSORY NOTE, 1, 6 to 8.

CONSPIRACY.

See CRIMINAL LAW, 14; FRAUD.

CONSTABLE.

See MITTIMUS, 1.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 6; TAXES, 2.

CONTINUANCE.

See BASTARDY, 2; CRIMINAL LAW, 15; MORTGAGE, 15.

1. *Affidavit for.—Absent Witness.—Attorney and Client.*—An affidavit for a continuance because of absent testimony is not sufficient unless it states the facts to which the absent witness can testify; nor is such affidavit sufficient on the ground that the party's counsel is not familiar with his defence, unless it shows that since the withdrawal of former counsel who was familiar with the defence, sufficient time has not elapsed, by the exercise of reasonable diligence, to enable the party to place his counsel in possession of the facts; nor is such affidavit sufficient on the ground of the party's own absence, unless it is shown that such party has a defence to establish. *Miller v. Harker, 234*
2. *Absent Witness.*—An application for a continuance by a party who has previously obtained a continuance, may, in the discretion of the court, be strictly scrutinized, and in the absence of manifest abuse, a refusal of the continuance will not be available error. *Breedlove v. Bundy, 319*

CONTRACT.

See CITY, 6, 7; COUNTY COMMISSIONERS, 7; CORPORATION; DECEDENTS' ESTATES, 1, 2; DEED; EXECUTION, 7; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; INFANCY; LANDLORD AND TENANT; MARRIED WOMAN; MECHANIC'S LIEN; MORTGAGE; NEGLIGENCE, 9; REAL ESTATE, ACTION TO RECOVER, 2, 3; SALE; SUBROGATION, 1; VENDOR AND VENDEE.

1. *Pleading.*—A written contract of lease, for a certain rent, with stipulations that the lessor will pay for repairs and will pay the lessor for the support of A., no time being fixed for the duration of the contract, and the kind and extent, the compensation for repairs, and for the support of A. not being fixed, is a contract partly in writing and partly in parol, and in a suit for the support of A. it need not be declared on as a contract in writing, but the complaint may be on an account. *Gordon v. Gordon, 134*
2. *Same.—Effect of Rescission.*—When, after supporting A. for a time, the writing was by agreement of the parties rescinded and destroyed, it did not destroy the right to recover for the services already rendered. *Id.*
3. *Same.—Evidence.*—Where a contract has been thus destroyed, its contents may be proved by parol. *Id.*
4. *Sale of Building.—License to Remove.*—The sale of a building not permanently annexed to the land, with a right of removal, although the contract is verbal, justifies the purchaser, having complied with his part of the contract, in entering upon the land and removing the building. *Rogers v. Cox, 157*
5. *Same.—License.*—The sale of personal property, by an owner of real estate, which can only be removed by entry thereon, thereby licenses the vendee to enter upon the land for the purpose of removal, and the license is irrevocable. *Id.*

6. *Complaint.—Joinder of Causes.—Declaring Lien.—Fraudulent Conveyance.*—In a suit upon a contract, the complaint may also, by virtue of section 280, R. S. 1881, embrace such other matters as may be necessary for a complete remedy, *e. g.*, decreeing a lien or charge on real estate, or setting aside a fraudulent conveyance. *Hamilton v. Burrieklow, 398*
7. *Same.—Conveyance for Support during Life.—Equity.—Charge upon Lands.—Demand.*—C. conveyed lands to E. in consideration that E. would pay his debts and support him during life, but E. refused, after receiving the deed, to put her contract so to do in writing, as she had agreed. She failed both to support C. and to pay his debts.
Held, that equity would charge the lands with E.'s support and with his debts, and that no demand of payment by C.'s creditors was necessary. *Id.*
8. *Evidence.—Receipt.*—A receipt for money paid on contract in part performance of it can not be regarded as a written contract so as to exclude parol evidence of the contract actually made. *Flood v. Joyner, 459*
9. *Work and Labor.—Set-Off.—Implied Contract.—Member of Family.—Account.*—To a common count for work and labor, an answer of set-off, or in bar, averring that the plaintiff, being a child four years old, destitute and abandoned by his parents, was taken by the defendant, as an act of charity, and without contract, and provided for, nurtured and educated as a member of his family, and containing a statement of account therefor, is bad as a bar, inasmuch as it does not deny the implied contract to pay for the labor which is shown by the complaint, nor state facts implying such denial, and bad as a set-off because it shows that the acts done for the plaintiff were gratuities.
Gerard v. Dill, 476
10. *Conversion.—Trover.—Agister.—Negligence.—Answer.—Pleading.*—To a complaint alleging the delivery of a horse to the defendant to be kept and pastured for a consideration, until the plaintiff would demand the horse, and that demand was made and the defendant failed and could not deliver the horse, an answer to the effect that the defendant was, by the terms of the contract, not to be responsible on account of any injury caused by a railroad passing over his farm, or loss or casualties resulting from insufficient fences to confine the horse, but failing to show that the failure to return the horse was caused by the railroad or insufficient fences, is bad on demurrer. *Glenn v. Dailey, 472*

CONVERSION.

- Trover.—Agister.—Contract.—Negligence.—Answer.—Pleading.*—To a complaint alleging the delivery of a horse to the defendant to be kept and pastured for a consideration, until the plaintiff would demand the horse, and that demand was made and the defendant failed and could not deliver the horse, an answer to the effect that the defendant was, by the terms of the contract, not to be responsible on account of any injury caused by a railroad passing over his farm, or loss or casualties resulting from insufficient fences to confine the horse, but failing to show that the failure to return the horse was caused by the railroad or insufficient fences, is bad on demurrer. *Glenn v. Dailey, 472*

CONVEYANCE.

- See CONTRACT, 6, 7; COUNTY RECORDER, 2; DEED; EVIDENCE, 12; EXECUTION, 7; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; MARRIED WOMAN, 1; MORTGAGE; TAXES, 3; VENDOR AND VENDEE, 1, 2.

COPY.

- See DEED, 1; MORTGAGE, 8; PLEADING, 11; TAXES, 3.

CORPORATION.

- See CITY; MORTGAGE, 6; NEGLIGENCE; SCHOOLS.

Foreign Corporation.—Filing Appointment of Agent.—Contracts by.—An instrument made by a foreign corporation, and deposited in the clerk's office pursuant to section 3022, R. S. 1881, showing that A. has been appointed "its agent for transacting business at I.," makes A. its general agent at that place, so that his acts will bind the corporation.
Morrow v. United States, etc., Co., 21

COSTS.

See EXECUTION, 3; PRACTICE, 1.

Suit by State on Relation of State Officer.—Relator Chargeable with Costs.—Payment of Relator's Costs by State.—Where suit is brought by the State, on the relation of the attorney general or other state officer, for the recovery of money or property claimed by the State, the relator is liable for costs, "and all costs taxed against such relator shall be paid by the State."
Henderson v. State, ex rel., 437

COUNTER-CLAIM.

See EXECUTION, 2; MORTGAGE, 10, 12, 14; PROMISSORY NOTE, 2; SALE, 2; SUPREME COURT, 17, 24.

COUNTY AUDITOR.

Clothing for Insane.—Allowance by County Commissioners.—Statute Construed.—Repeal of Statute.—When clothing has been purchased in good faith by the clerk for an insane person, as directed by section 2856, R. S. 1881, it is the duty of the county auditor to draw a warrant for the amount thereof upon the clerk's certificate, and it is not necessary that the claim shall be presented for allowance to the board of commissioners. This statute, inasmuch as it relates to a special subject, is not repealed by subsequent general statutes requiring claims to be presented for allowance to the board.
Morris v. State, ex rel., 597

COUNTY CLERK.

See COUNTY AUDITOR.

COUNTY COMMISSIONERS.

See CITY, 4, 5; COUNTY AUDITOR; COUNTY SCHOOL SUPERINTENDENT; COUNTY TREASURER; NEGLIGENCE, 1, 2, 8.

1. *Appeal.—Transcript.—Bond.—Approval.—Dismissal.*—There is no error in the dismissal of an appeal from the board of county commissioners, when it appears that no appeal bond, approved by the county auditor, and no complete transcript of the proceedings of the county board, were filed in the circuit court.
Shirk v. Moore, 199
2. *Appointment of Secretary for Board of Health.—Term of Office.*—The term of secretary of the county board of health is, by section 4993, R. S. 1881, one year, and the county board, after having elected, can not annul their action, nor elect a successor until the year has expired.
Weir v. State, ex rel., 311
3. *Same.—Contest of Appointment.—Eligibility.—Complaint.*—The only qualification required of the secretary of a county board of health is, that he shall be a physician, and in a contest for the office it is sufficient to so state, but an averment merely that he is competent and qualified, is fatally insufficient.
Ib.
4. *Same.—Evidence.—Record.—Collateral Attack.*—In a collateral inquiry, a record of the county board, showing an act done on a certain day, can not be questioned by proof that on that day the board was not in session, and such a record, though not signed, is competent evidence of the act done.
Ib.

5. *Vacancy.—Holding Over.—Office and Officer.*—Where one is elected county commissioner, qualifies by taking the oath required by law, and dies before his term begins, his predecessor can not hold over.
State, ex rel., v. Bemenderfer, 374
6. *Voluntary Services.—Complaint.*—A paragraph of complaint against a county board, in the form of a common count for work and labor performed in preparing an index, is bad on demurrer unless it avers that the services were rendered on request.
Hoffman v. Board, etc., 84
7. *Same.—Special Contract.—Indexing Records.*—The county board has power to contract for indexing the public records of the county, and such contract may be enforced.
Ib.

COUNTY RECORDER.

1. *Official Bond.—Statute Construed.*—The official bond of a county recorder, given pursuant to section 5929, is binding upon the principal and his sureties therein, under the provisions of section 5528, R. S. 1881, for the faithful discharge of all duties required of such officer by any law, then or subsequently in force, for the use of any person injured by any breach of the condition thereof.
State, ex rel., v. Davis, 539
2. *Same.—Record of Deed.—Mistake in Record as to Amount of Grantee's Assumption of Encumbrance.—Liability of Recorder.—Notice.*—The record of any instrument, entitled to be recorded, is only notice of the existence and record of such instrument and of the contents, *not* of the instrument itself, but *only* of such record. Where, therefore, a deed containing the grantee's agreement to assume and pay the sum of five hundred dollars as a part of the mortgage debt on the land conveyed, by the mistake of the recorder is so recorded as to show the grantee's assumption of only two hundred dollars of such mortgage debt, the recorder and his sureties are liable, upon his official bond, for the damages sustained by the grantor in such deed by reason of such mistake.
Ib.

COUNTY SCHOOL SUPERINTENDENT.

See CRIMINAL LAW, 25.

Office Rent.—County Not Liable for.—The county commissioners are not required to furnish the county superintendent with an office, nor, if such duty rested upon them, would they be liable to him, in the absence of a contract, for the use of his own office as such superintendent.
Board, etc., v. Atzell, 334

COUNTY TREASURER.

County Commissioners.—Authority.—Right to Buy Bonds.—County Property.—A county treasurer who has received from his predecessor United States bonds belonging to the county, which had been purchased by order of the county board, and held as county property, must, on sale thereof, account for the entire proceeds thereof, including any premium, and he can not, for his own profit, question the power of the county to make the purchase.
Nixon v. State, ex rel., 111

COURTS.

Superior Court.—Appeal.—Estoppel.—Waiver.—From the action of the court in general term reversing the judgment at special term, and remanding the cause, a party prayed an appeal to the Supreme Court, but filed no bond. Afterwards he appeared at special term, where the mandate of the general term was executed by sustaining a demurrer to his complaint, and, declining to amend, he excepted. He then, within the time allowed by law, perfected his appeal to the Supreme Court from the judgment at general term by filing a transcript.

Held, that the action of the appellant at special term did not waive or estop the appeal prayed.
Turner v. Indianapolis, 51

CRIMINAL LAW.

See INTOXICATING LIQUOR, 3 to 6; MITTIMUS; PRACTICE, 9; SUPREME COURT, 3.

1. *Misconduct of Bailiff and Jury.*—Where, upon the evidence, the verdict is clearly right, the fact that the bailiff, having the jury out, under order of the court, for exercise, took them past the scene of the crime with which the defendant was charged, is not sufficient ground for a new trial, where it appears that nothing occurred to influence the jury.
Luck v. State, 16
2. *Same.—Venue.—Evidence.*—Where the venue of an alleged crime is laid in the county of Floyd and State of Indiana, proof that the crime occurred in the city of New Albany, Indiana, is sufficient proof of the venue.
Ib.
3. *Same.—Manslaughter.—Intent.—Supreme Court.*—Where, upon a violent and unlawful attack, death soon ensues, a jury may find an intent upon the part of the assailant to kill, and the Supreme Court will not interfere to reduce a verdict of voluntary manslaughter to involuntary manslaughter.
Ib.
4. *Escaped Convict.—Dismissal of Appeal.—Supreme Court.*—When it is shown to the Supreme Court that an appeal there pending is prosecuted in the name of a convicted defendant, who has escaped from legal custody and is at large, the appeal will be dismissed. *Sargent v. State, 63*
5. *Prosecution by Information.—Abatement.*—A plea in abatement to an information, alleging that after the filing of the affidavit and information, which was done in term time, the grand jury had been in session during the same time and been discharged, without returning an indictment against defendant, is bad on demurrer. *Elder v. State, 162*
6. *Same.—Constitutional Law.—Title of Act.—Special Legislation.*—The provisions of section 1679, R. S. 1881, are within the title of the act of which it is a part, and they are not special legislation within the meaning of sections 22 and 23, art. 4, of the State Constitution. *Ib.*
7. *Same.—Evidence.*—Proof of the facts necessary to authorize a prosecution by information is unnecessary, where there is no plea in abatement putting them in issue. R. S. 1881, section 1733. *Ib.*
8. *Justice of the Peace.—Practice.—Appeal.*—A justice of the peace can not render judgment against the accused in a criminal case in his absence, if imprisonment may, by law, be a part of the penalty for the offence, but he may receive the verdict of a jury, and bring the defendant in by warrant to receive judgment; and delay in so doing will not vitiate the judgment. In such case an appeal before judgment is a nullity.
Sturgeon v. Gray, 166
9. *Same.—Several Defendants.—Judgment.—Statute Construed.*—In a criminal prosecution against two defendants jointly, the judgment against those found guilty should be several, and not joint; and if one be absent on the return of a verdict, the rendition of judgment against one does not prevent a judgment against the other when brought in, and from that judgment he may appeal, under R. S. 1881, section 1643, within ten days thereafter.
Ib.
10. *Death Penalty.—Time of Execution.—Waiver.*—Section 1872, R. S. 1881, is imperative that judgment of death shall be executed at a time not less than one hundred days after conviction, and this requirement can not be waived by the defendant.
Koerner v. State, 248
11. *Same.—Appeal.—Practice.—Scumble,* that after an appeal, whereby an error in the judgment as to the time of executing the death penalty has been corrected in obedience to the mandate of the Supreme Court, another appeal will lie for the correction of other and prior errors in the same record.
Ib.

12. *Pleading.—Practice.—Indictment.—Information.*—Where, upon the quashing of an indictment, the prosecuting attorney, upon affidavit, files an information charging the same offence, no question as to the action of the court in quashing the indictment can be made in the Supreme Court. *State v. Cooper, 331*
13. *Same.—Affidavit.—Signature of Affiant.—Name.—Plea in Abatement.*—A plea in abatement of an information, that the real name of the person who made the affidavit is not the name signed to the affidavit, that the affiant's true name is different (stating it), and that the name signed is fictitious, is bad on demurrer. *Ib.*
14. *Conspiracy.—Bribery.—School Trustee.—Employment of Teacher.—Indictment.*—An indictment, charging a conspiracy to bribe a township trustee by the payment or promise of money, to employ a person as a teacher of a public school in the township, is good, under section 2133, R. S. 1881, without averring that any of the schools was vacant. *Shircliff v. State, 369*
15. *Same.—Bill of Exceptions.—Continuance.—Affidavits.—Record.*—In criminal cases, affidavits in support of a motion for a continuance or other motions are made part of the record only by bill of exceptions, and if this be filed in vacation, no time having been given therefor, it is no part of the record. *Ib.*
16. *Same.—Discharge of Defendant to Testify.—Witness.—Practice.*—Where one of two persons indicted is discharged under section 1804, R. S. 1881, in order to make him a witness, objection thereto can not be first made in the Supreme Court. *Ib.*
17. *Same.—Special Judge.—Appointment of.—Presumption.—Judgment.*—After a verdict of guilty upon an indictment, and motions for a new trial and in arrest of judgment and for discharge had been overruled, the defendant made default before judgment. At the next term the special judge who tried the cause was absent, and the regular judge, being unable to hold the court, appointed another special judge, whose appointment and oath were entered of record, and on the same day another special judge was appointed, and his appointment and oath likewise recorded, and this last judge acted in the cause, and rendered judgment. It did not appear whether the special judge first appointed acted at any time during the term.
Held, that it would be presumed that the judge who acted was appointed because the first appointee absented himself, and, therefore, properly appointed. *Ib.*
18. *Defective Indictment.—Refusal to Quash.—Error.*—Under section 1756, R. S. 1881, the refusal to quash an indictment for a defect or imperfection therein, which does not tend to the prejudice of the substantial rights of the defendant upon the merits, is not an available error for the reversal of the judgment. *Stout v. State, 407*
19. *Same.—Intoxicating Liquor.—Unlawful Sale of Beer.—Evidence.—Presumption.*—Where the defendant is prosecuted for an unlawful sale of intoxicating liquor, and upon the trial the evidence shows a sale of beer under circumstances which would make the sale unlawful if the beer was intoxicating, it will be presumed, in the absence of evidence to the contrary, that the beer so sold was a malt or an intoxicating liquor. *Ib.*
20. *Same.—Instructions.—Supreme Court.*—Instructions to the jury are construed by the Supreme Court, with reference to each other and as an entirety; and if, thus construed, they present the law fairly and correctly, and are not calculated to mislead, they will afford no sufficient ground for the reversal of the judgment, although some of the expressions therein, if they stood alone, might be erroneous. *Ib.*

21. *Same.*—*Argument of Counsel.*—*Reading Law to Jury.*—As the Constitution of this State, in all criminal causes, makes the jury the ultimate judges of the law, there is no error in permitting counsel, in argument to the jury, to read and discuss the law applicable to the case. *Ib.*
22. *Libel.*—*Statute Valid.*—Section 1925, R. S. 1881, providing punishment for publishing libels, is valid. *Hartford v. State, 461*
23. *Same.*—A statute providing for the punishment of an offence is valid though it do not define the meaning of the words employed in describing the offence. *Ib.*
24. *Same.*—The word "libel," as used in section 1925, R. S. 1881, must be taken in its common law sense, which is well expressed by section 1, Acts 1879, p. 154. *Ib.*
25. *Same.*—*County School Superintendent.*—*Bribery.*—A newspaper publication, charging that a county superintendent of schools, for a consideration in money, had, by the use of his influence, induced the county board of education to order a change in school books, is a libel in the sense of the statute. *Ib.*
26. *Same.*—A publication may be libellous which does not impute a crime. *Ib.*
27. *Same.*—*Evidence.*—*Impeachment of Witness.*—Publications by a witness upon the subject to which his testimony relates are admissible in evidence to impeach his testimony. *Ib.*
28. *Same.*—*Mitigation.*—It may be shown in mitigation of punishment, in a criminal prosecution for libel, that the libel was provoked by a libel upon the defendant published shortly before by the prosecuting witness. *Ib.*
29. *Same.*—*Witness.*—*Instruction.*—*Weighing Evidence.*—*Jury.*—The law does not require the jury, in weighing the evidence of a witness in a criminal case to consider the fact that the witness is the defendant on trial, and it is error to so instruct. *Ib.*
30. *Same.*—The testimony of a witness found by the jury to be true must be believed and acted upon, and it is error to instruct that it is only entitled to the same weight as that of other witnesses. *Ib.*
31. *Murder.*—*Evidence.*—*Threats.*—*Consideration by Jury.*—It is competent for the State, in a prosecution for murder, to prove threats made by the accused against the deceased, although made a long time prior to the homicide, but in determining their weight the jury may consider their remoteness from the time of the homicide. *Goodwin v. State, 550*
32. *Same.*—*Declarations of Accused.*—*Effect of Ruling on Competency.*—Where the declarations of an accused are susceptible of more than one interpretation, it is for the jury to determine from the evidence what interpretation they shall have, and the court, in ruling them to be competent, does not determine that they shall have an interpretation adverse to the innocence of the defendant. *Ib.*
33. *Same.*—*Witness.*—*Expert.*—*Definition of Words.*—There is no error in refusing to permit an expert witness, on the direct examination, to give a definition of a word which has a fixed and well known signification. *Ib.*
34. *Same.*—*Hypothetical Questions.*—*Evidence.*—It is not necessary to embody in a question asked an expert witness all of the matters of which there is any evidence; such a question is proper if it embodies such material facts, fairly within the range of the evidence, as counsel deem to have been proved. *Ib.*
35. *Same.*—*Opinion of Witness as to Accused's Power of Control.*—It is not error to refuse to permit a witness to express an opinion as to whether

- a person accused of crime can or can not control his appetite for intoxicating liquor. *Ib.*
36. *Same.—Voluntary Drunkenness.*—Voluntary drunkenness is no excuse for the crime of homicide. *Ib.*
37. *Same.—Evidence.—Discretion of Court.—Supreme Court.*—The trial court may permit the State to introduce evidence after the defendant has closed his evidence, and the Supreme Court will not reverse a judgment unless the trial court has abused its discretionary power in this respect. *Ib.*
38. *Same.—Insanity.—Effect of Order of Commission.*—The order of a commission composed of two justices of the peace and a physician, declaring a person to be insane and entitled to admission to the hospital for the insane, is not conclusive, and the State may introduce evidence tending to show the defendant's sanity, both before and after his admission into the hospital. *Ib.*
39. *Same.—Opinion of Non-Expert Witness.*—A non-expert witness must state the facts upon which he bases his opinion, but if he states that he has had an acquaintance with the accused, and has had conversations and dealings with him, he may then express an opinion. *Ib.*
40. *Same.—Instructions.*—Instructions are to be taken together, and if when so taken they express the law correctly, there is no available error. *Ib.*
41. *Same.—Criminal Responsibility.*—Where one has mental capacity sufficient to fully comprehend the nature and consequences of an act and unimpaired will power strong enough to master an impulse to commit a crime, there is criminal responsibility, and an instruction embodying this doctrine is a correct expression of the law. *Ib.*
42. *Same.—Mental Depravity.*—It is not error to instruct the jury that mere mental depravity is not insanity. *Ib.*
43. *Same.—Delirium.—Instructions.*—An instruction, that "Insanity of a permanent nature, when once shown to exist, is presumed to continue until the contrary appears, but where *delirium tremens* is set up as a defence, the delirium must exist at the time the act was committed, as there is no presumption of its existence from antecedent fits from which the offending person has recovered," is a substantially correct statement of the law. *Ib.*
44. *Same.—Value of Testimony of Expert Witness.*—It is proper to give the following instruction: "The opinions of medical experts are to be considered by you in connection with all the other evidence in the case, but you are not bound to act upon them to the exclusion of all other evidence. Taking into consideration these opinions, and giving them just weight, you are to determine for yourselves, from the whole evidence, whether the accused was or was not of sound mind, yielding him the benefit of a reasonable doubt, if any such doubt arises." *Ib.*
45. *Same.*—The ruling in the case of *Guetig v. State*, 66 Ind. 94, approving instructions set forth in the opinion in that case adopted and followed. *Ib.*
46. *Same.—Insanity.—Perversion of the Affections.*—A perversion of the affections does not constitute insanity, if there is mental capacity sufficient to fully comprehend the nature and consequences of a criminal act, and no disease of the will power impairing its strength. *Ib.*
47. *Same.—Declarations of Inmate of Hospital for the Insane.*—An instruction, that "Any statement, declaration, or admission of the defendant that may have been introduced in evidence by the State, made while he was an inmate of the Indiana Hospital for the Insane, must be regarded and held by you, in your consideration thereof, as the statement, declaration, or admission of a person of unsound mind, and

allowed no weight whatever against the defendant, unless the evidence in this case proves to your satisfaction 'beyond a reasonable doubt, that the defendant was of sound mind when he made such statements, admissions, or declarations,' was held to have been correctly refused. *Ib.*

48. *Same.—Motives.*—It is not error to refuse an instruction, unless it is the duty of the court to give it in the terms in which it is prayed, and there is no error in refusing an instruction which gives undue prominence to the absence of motive, and to the fact that the homicide was committed under circumstances which rendered detection and arrest inevitable. *Ib.*
49. *Same.—Frenzy.*—A frenzy arising from passion is not mental unsoundness within the meaning of the law. *Ib.*
50. *Fornication.—Adultery.—Indictment.*—An indictment, charging that at, etc., on, etc., C, a married man, and B, an unmarried woman, said C. and B. not being then and there married to each other, did unlawfully live and cohabit together as man and wife, is good under section 1991, R. S. 1881. *State v. Chandler, 591*

DAMAGES.

See CITY, 1 to 3, 8, 9; COUNTY RECORDER, 2; DECEDENTS' ESTATES, 1; FRAUD; GUARDIAN AND WARD, 2; MECHANIC'S LIEN; MORTGAGE, 9; NEGLIGENCE; RAILROAD; SALE, 1; TELEGRAPH, 2.

DECEDENTS' ESTATES.

See MORTGAGE, 1; WITNESS, 2.

1. *Contract.—Nominal Damages.—Complaint.—Supreme Court.*—A joint debtor, having obtained an agreement with those jointly indebted, that they would assume payment of the debt, died, whereupon the debt was allowed against his estate. His administrator sued the survivors, alleging the foregoing facts, but alleging neither that his decedent's estate had been compelled to pay said debt, nor that there were any assets belonging to such estate. *Held*, that the complaint showed no cause of action for more than nominal damages, and that the Supreme Court will not reverse in such case. *Rhine v. Morris, 81*
2. *Lease.—Descents.—Life-Estate.—Chattel.*—A lease of lands for the life of the lessor is a chattel, and on the death of the lessee it goes, not to his heirs, but to his administrator, and the former can not maintain a suit for possession. *Cunningham v. Barley, 367*
3. *Appeal to Supreme Court.—Dismissal of Appeal.*—Where an administrator considers himself aggrieved by a decision of a circuit court, or judge thereof in vacation, growing out of any matter connected with a decedent's estate, and prosecutes an appeal from such decision to the Supreme Court, he is not required to file any appeal bond; but he must file a transcript of the record, on his appeal, in the Supreme Court, at the latest, within twenty days after such decision was made, unless, "for good cause shown," such time has been extended by the Supreme Court. Otherwise a motion to dismiss the appeal must be sustained. *Yearley v. Sharp, 469*

DECLARATIONS.

See CRIMINAL LAW, 32, 47; EVIDENCE, 6, 8, 10; PARTITION, 3; WITNESS, 2.

DEDICATION.

See HIGHWAY, 2.

DEED.

See CONTRACT, 6, 7; COUNTY RECORDER, 2; EVIDENCE, 12; EXECUTION,

7; FRAUDULENT CONVEYANCE; HUSBAND AND WIFE; MARRIED WOMAN, 1; MORTGAGE, 7, 8; TAXES, 3; VENDOR AND VENDEE, 1, 2.

1. *Escrow. — Mortgage. — Pleading. — Exhibit. — Description.*—Where the owner of an equitable estate executes an instrument to secure a debt without describing the land in it, and at the same time, and as a part of the same transaction, executes a deed containing an accurate description, and leaves it in escrow to be delivered to the other party upon default of payment, in a suit to enforce such lien such deed is a proper exhibit, and the description therein contained will supply the want of one in the other instrument. *Burkum v. Burk, 270*
2. *Same.—Title.*—A deed while held as an escrow conveys no title. *Ib.*
3. *Warranty Deed.—Grantee's Assumption of Encumbrance.—Personal Debt of Grantee.—Grantor, Grantee's Surety.*—Where the grantee in a warranty deed, containing his agreement to assume and pay the sum of five hundred dollars, as secured by mortgage given by the grantor on the land conveyed to a certain named person, accepts such deed, then, as between the grantee and the grantor, the sum of five hundred dollars, as a part of the mortgage debt, although evidenced by the grantor's notes, becomes the personal debt of the grantee, and the land conveyed to the grantee, notwithstanding the warranty in the grantor's deed, becomes and is bound for the payment of such debt.

State, ex rel., v. Davis, 539

DEFAULT.

See JUDGMENT, 2, 3, 6 to 8.

DEFECTS CURED.

See ASSIGNMENT OF ERROR, 4.

DELIVERY.

See VENDOR AND VENDEE, 1, 2.

DEMAND.

See CONTRACT, 7; REAL ESTATE, ACTION TO RECOVER, 1; VENDOR AND VENDEE, 2.

DEMURRER.

See DEMURRER TO EVIDENCE; HABEAS CORPUS; PLEADING, 3 to 9; PRACTICE, 4; RECEIVER, 3; SUPREME COURT, 4, 12.

DEMURRER TO EVIDENCE.

1. *New Trial.*—Where there is a demurrer to evidence, a motion for a new trial is not admissible. *Radcliff v. Radford, 432*
2. *Same.*—Upon a demurrer to evidence, every reasonable inference against the demurrant, which might be drawn by a jury, must be taken as true by the court. *Ib.*

DESCENTS.

See DECEDENTS' ESTATES, 2; EVIDENCE, 8; WILL, 2.

DESCRIPTION.

See DEED, 1; MECHANIC'S LIEN; MORTGAGE, 5.

DISAFFIRMANCE.

See MARRIED WOMAN, 1.

DISCRETION OF COURT.

See CONTINUANCE, 2; CRIMINAL LAW, 37; PRACTICE, 1, 10.

DISMISSAL.

See BASTARDY, 1; COUNTY COMMISSIONERS, 1; CRIMINAL LAW, 4; DECEDENTS' ESTATES, 3; REPLEVIN, 1; SUPREME COURT, 3, 17, 19, 24, 31.

DIVORCE.

1. *Custody of Children.*—*Statute Construed.*—*Res Adjudicata.*—Where a divorce is granted, it is the duty of the court, R. S. 1881, section 1046, without regard to the issues or the wishes of the parties, to make provision for the custody of the minor children, and where a decree on that subject is entered subject to future modification, it is an adjudication upon all the facts then existing, whether actually in proof or not, touching the fitness of the parties to have such custody.
Dubois v. Johnson, 6
2. *Same.*—*Modification of Decree.*—In such case a subsequent modification of the decree as to children can only be made for reasons occurring after the original decree. *Ib.*
3. *Same.*—*Evidence.*—In such case, where a divorced husband applies to modify the decree which gave custody of a child to the wife, upon the ground that at the time of the application she was living in open and notorious fornication with one D., proof of her adultery, or other indecent acts, with D., before the divorce, is inadmissible, even as tending to illustrate facts occurring afterwards. *Ib.*
4. *Same.*—In such case evidence of the good character of D. is admissible. *Ib.*

DRAINAGE.

See CITY, 8, 9.

Notice to Pay Assessment.—*Publication of.*—*Evidence.*—A single publication of a proper notice to pay an assessment for drainage, made in a newspaper of the county thirty days before the time fixed for payment, is a compliance with section 4277, R. S. 1881, and is sufficient as to time; but proof that "a notice was sent to the land-owner by mail," without evidence of the time when or place where it was sent, or the contents of the notice, is not sufficient. *Hayes v. State, ex rel., 234*

DRUNKENNESS.

See CRIMINAL LAW, 36.

EJECTMENT.

See REAL ESTATE, ACTION TO RECOVER.

EMPLOYER AND EMPLOYEE.

See CITY, 1, 2; NEGLIGENCE, 5.

ENDORSER AND ENDORSEE.

See MORTGAGE, 17; PROMISSORY NOTE, 2 to 6.

EQUITY.

See CONTRACT, 7; JUDGMENT, 1; LANDLORD AND TENANT.

ESCROW.

See DEED, 1, 2.

ESTOPPEL.

See COURTS; MARRIED WOMAN, 1; SUPREME COURT, 33.

EVIDENCE.

See CONTRACT, 3, 8; COUNTY COMMISSIONERS, 4; CRIMINAL LAW, 1, 2, 7, 19, 27 to 39, 44; DEMURRER TO EVIDENCE; DIVORCE, 3, 4; DRAINAGE; EXECUTION, 7; HIGHWAY; INSTRUCTIONS TO JURY, 1; INTOXICATING LIQUOR, 4 to 6; MORTGAGE, 12, 15, 17; PRACTICE, 2, 7, 10; RECEIVER, 2; SUPREME COURT, 4, 5, 10, 11, 15, 23, 25; WITNESS, 2 to 5.

1. *Harmless Error*.—The admission of unnecessary and immaterial evidence is a harmless error.
Board, etc., v. Bacon, 31; Newcomer v. Hutchings, 119
2. *Hearsay*.—Conversations between persons not parties to the suit or their agents, and never communicated to either party, are not competent evidence. *Ib.*
3. *Harmless Error*.—The admission of evidence which can not possibly injure the opposite party is, if erroneous, harmless.
Thompson v. Deprez, 67; Aufdenkamp v. Smith, 328
4. *Admissions.—Instructions*.—An instruction to the effect that evidence of oral admissions should be scrutinized closely because of the possibility that the party might not have expressed himself clearly, and that the witness might not hear or repeat correctly, is erroneous.
Newman v. Hazlrigg, 73
5. *Highway.—Witness.—Opinion*.—The opinion of a witness as to the public utility of a proposed change of a highway is not admissible as evidence.
Thompson v. Deprez, 67
6. *Res Gestæ.—Declarations of Ownership*.—The declaration of one, shown to be at the time in possession of personal property, that he owns it, is proper evidence in behalf of his administrator, in a suit by the latter to recover it.
McConnell v. Hannah, 102
7. *Tax Duplicate.—Parol Partition*.—Where it is in controversy whether a parol partition had been made, the tax duplicate showing that the lands were taxed to the respective persons to whom they were supposed to have been allotted, is admissible in evidence as tending to show the partition.
McSweeney v. McMillen, 298
8. *Same.—Declarations of Ancestor.—Heir.—Title*.—Where, in partition, the title is in question, declarations of an ancestor from whom a party claims by descent, to the effect that the ancestor had no title, are admissible against such heir. *Ib.*
9. *Same.—Witness*.—There is no error in refusing to allow a question to a witness, any answer to which would be wholly immaterial, and when no reason for asking the question is given. *Ib.*
10. *Same.—Declarations of Grantor*.—Declarations by a grantor in disparagement of the title granted, made after the grant and in the absence of the grantee, are not proper evidence against the grantee. *Ib.*
11. *Insanity.—Witness*.—The record of justices, made in 1872, finding a person to be insane and a proper person to be admitted to the insane hospital for curable insane, is not admissible evidence as tending to prove that the same person, offered as a witness, was insane in 1881.
Breedlove v. Bundy, 319
12. *Deed.—Consideration.—Parol Evidence*.—Parol evidence is admissible to show what was the consideration for a deed. *Hamilton v. Barricklow, 338*
13. *Practice.—Harmless Error*.—The admission of irrelevant and immaterial evidence is a harmless error.
Henry v. Carson, 412

EXCEPTIONS.

See HABEAS CORPUS; MORTGAGE, 12; SUPREME COURT, 12, 27.

EXECUTION.

See JUDGMENT, 1; REPLEVIN, 2.

1. *Complaint to Set Aside.—Fieri Facias*.—A complaint by a defendant in execution, to set aside a writ of *fieri facias*, alleging the issue, levy on lands and return without sale or other disposition of the levy, and then the issue of an alias *fieri facias*, is good on demurrer.

McIver v. Ballard, 76

2. *Same.—Answer of Abandonment of Levy.*—An answer to such complaint, that the levy had been abandoned, is bad on demurrer; so, also, is an answer or counter-claim, averring the same facts appearing by the complaint, and praying a correction of the alias *feri facias* so as to conform to the statute. 2 R. S. 1876, p. 212, section 454; R. S. 1881, section 741. *Ib.*
3. *Same.—Costs.*—If the alias *feri facias* in such case could be corrected as prayed, the costs should be taxed to the execution plaintiff. *Ib.*
4. *Injunction.—Practice.—Judgment.*—An execution, collectible without relief from appraisement laws, upon a judgment which does not authorize it, must be corrected by motion, and an injunction is not the proper remedy. *Martin v. Pifer, 245*
5. *Exemption.—Injunction.—Pleading.—Practice.*—A complaint by A. against a sheriff, showing a judgment against B. before a justice of the peace, the filing of a transcript making a lien on land of the debtor, a subsequent conveyance of the land to A., the issue of execution to the sheriff which was levied on the land, notwithstanding a proper claim by schedule of the exemption of the land from execution, its return without sale and the issue of a *venditioni exponas*, without precept, upon which the sheriff was about to sell the land, and praying an injunction, is bad as a complaint, but good as a motion to set aside the *vendi.* for irregularity, and there is no error in overruling a demurrer to it. *Berry v. Nichols, 287*
6. *Same.—Judgment.*—A judgment on such a complaint, perpetually enjoining the sale and relieving the land of the lien, is not authorized, and a motion to modify it so as merely to enjoin a sale under the *vendi.* should be sustained. *Ib.*
7. *Proceedings Supplementary.—Affidavit.—Fraud.—Contract.*—An affidavit in supplementary proceedings under section 819, R. S. 1881, which charges that A. P. is indebted to the judgment debtor in the value of certain lands conveyed by the former to the latter, presents no question of fraud, and proof of such conveyance in consideration of an agreement by A. P. to pay certain other debts of the debtor and to support him during life, does not support the conclusion that A. P. is indebted in a sum equal to the value of the lands, as charged. *Pounds v. Chatham, 342*
8. *Same.—Judgment.—Appeal.*—An appeal lies from a judgment in such case requiring A. P., unless he at once reconvey the land, to pay to the judgment plaintiff the amount found to be the value of the land. *Ib.*
9. *Leave to Issue.*—An application for leave to issue execution under section 675, R. S. 1881, made by another than the plaintiff, is sufficient on demurrer, if it state that the applicant owns the judgment without stating the facts showing such ownership. *Martin v. Orr, 491*
10. *Same.—Principal and Surety.—Discharge of Surety.—Notice to Sue.—Failure to Issue Execution.*—Where a surety by notice requires the creditor to sue, according to section 1210, R. S. 1881, a failure to issue execution within a reasonable time after judgment, discharges the surety giving the notice, but not a co-surety not giving notice. *Ib.*

EXEMPTION.

See EXECUTION, 5, 6; REPLEVIN, 2.

EXHIBIT.

See DEED, 1; MORTGAGE, 8; PLEADING, 11; TAXES, 3.

EXPERT.

See CRIMINAL LAW, 33 to 35, 39, 44.

FEES AND SALARIES.

See AUDITOR OF STATE, 1, 2.

FORECLOSURE.

See DEED, 1; MORTGAGE; RECEIVER, 2 to 4.

FOREIGN CORPORATION.

See CORPORATION.

FOREIGN JUDGMENT.

See WILL, 3.

FORMER ADJUDICATION.

See DIVORCE, 1, 2; WILL, 3.

FORNICATION.

See CRIMINAL LAW, 50.

FRAUD.

See EXECUTION, 7; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 3; PROMISSORY NOTE, 1, 3, 6; VENDOR AND VENDEE, 1, 2.

Conspiracy.—Where several conspire to defraud another for the benefit of one, all are liable in damages for the fraud. *Breedlove v. Bundy*, 319

FRAUDULENT CONVEYANCE.

See CONTRACT, 6.

1. *Agreement of Vendee to Reconvey.*—A conveyance back to the grantor of property conveyed to defraud creditors, pursuant to an agreement made at the time, is not fraudulent or illegal.

Second Nat'l Bk. v. Brady, 498

2. *Same.—Consideration.—Promissory Notes.*—*Promise to Reconvey.*—Where a grantee in a deed executed to defraud creditors reconveys the property solely in consideration of the verbal promise made at the time of the first conveyance, and non-commercial promissory notes are executed at the time of the reconveyance to give color to the transaction, there is no consideration for such notes. *Ib.*

3. *Same.—Legality of Consideration.*—Notes executed at the time a reconveyance of the land is made by the grantee to the fraudulent grantor, pursuant to the verbal agreement made during the original transaction, are not tainted by the illegality of that transaction. *Ib.*

GRAND JURY.

See CRIMINAL LAW, 5.

GUARDIAN AND WARD.

1. *Assignment by Ward.—Attorney.—Money Had and Received.—Complaint.*—A guardian, whose ward had reached full age, made his final report, showing due the ward \$245, and that the money was paid into court, and left it and the money with his attorney, to present to the court, pay in the money and procure his discharge. On the same day, the ward assigned by a writing \$150 of this money to the plaintiffs, but the attorney, upon demand, refused to pay it to them, but did pay it to the ward. The complaint against the attorney was in the ordinary form for money had and received.

Held, that the complaint was good, and the plaintiffs were entitled to recover. *McFadden v. Wilson*, 253

2. *Negligence.—Breach of Duty.—Responsibility of Guardian for Consequence of his Corrupting Female Ward.*—Where a guardian of the person and estate of a minor, a female just entering womanhood, ignorant, chaste, of weak mind, and without living parents, took control of her person

and placed her in his family as a servant, and, knowing her to be such a person, took indecent liberties with her person, thereby exciting her passion, telling her that it was not improper for her to permit him to do so, and that the act of sexual intercourse would not injure her, and thereafter, while she still so remained in his family, he, knowing her to be still ignorant and weak-minded, negligently suffered and permitted his son, a well grown lad, to sleep with her and to have sexual intercourse with her, whereby she became pregnant, the guardian is liable to the ward for the injury so suffered by her.

Brattain v. Cannady, 266

HABEAS CORPUS.

See MITTIMUS, 2.

Return.—Practice.—Harmless Error.—Objection to the sufficiency of a return to a writ of *habeas corpus* should be taken by exceptions, and not by demurrer; but if the return be insufficient, and so held upon demurrer, the irregularity in practice is harmless. *Sturgeon v. Gray, 166*

HARMLESS ERROR.

See EVIDENCE, 1, 3, 13; HABEAS CORPUS; MORTGAGE, 12, 15, 18; NEGLIGENCE, 4; PLEADING, 5; PRACTICE, 5; PROMISSORY NOTE, 6; SUPREME COURT, 4, 10, 13, 21.

HEIR.

See DECEDENTS' ESTATES, 2; EVIDENCE, 8; MORTGAGE, 1; PARTITION, 3.

HIGHWAY.

1. *Evidence.—Witness.—Opinion.*—The opinion of a witness as to the public utility of a proposed change of a highway is not admissible as evidence. *Thompson v. Deprez, 67*
2. *User.—Dedication.—Instructions.—Evidence.—Harmless Error.*—Where in an action for an injury resulting from a defective bridge negligently permitted to become out of repair, the evidence shows without dispute that the bridge was located on a highway which has been used as such more than twenty years, an instruction that fifteen years' public use makes a highway, though erroneous, is harmless, the verdict being clearly right on the evidence. *Board, etc., v. Bacon, 31*

HUSBAND AND WIFE.

See MARRIED WOMAN; WITNESS, 2.

Resulting Trust.—Conveyance.—Agreement.—Where a husband buys land with his wife's money, taking a deed therefor in his own name, without her consent, or with her consent, agreeing orally to hold the land in trust for her, a trust results in her favor under section 2976, R. S. 1881. *Radcliff v. Radford, 432*

INDICTMENT.

See CRIMINAL LAW, 12 to 14, 18, 50; INTOXICATING LIQUOR, 3.

INFANCY.

See MARRIED WOMAN, 1.

Pleading.—Contract.—Presumption.—In pleading a contract it is not necessary to aver that the party sought to be bound was an adult, as, in the absence of averment and proof, that fact will be presumed. *McSweeney v. McMillen, 298*

INFANT.

See GUARDIAN AND WARD, 2; INFANCY; MARRIED WOMAN, 1.

INFORMATION.

See CRIMINAL LAW, 5 to 7, 12 to 14.

INJUNCTION.

See CITY, 4; EXECUTION, 4 to 6.

Enjoining Lawsuit.—Defence.—The defendant can not, as a general rule, enjoin the prosecution of legal proceedings upon grounds of which he might avail himself in the defence of such proceedings. *Martin v. Orr*, 27

INSANITY.

See COUNTY AUDITOR; CRIMINAL LAW, 38, 41 to 47, 49; EVIDENCE, 11.

INSOLVENCY.

See MORTGAGE, 14, 17; RECEIVER, 4.

ISSUES.

See SUPREME COURT, 19.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 20, 29, 30, 40 to 45, 47, 48; EVIDENCE, 4; HIGHWAY, 2; NEGLIGENCE, 4; PRACTICE, 3, 8; SUPREME COURT, 6, 16, 22; WITNESS, 4, 5.

1. *Evidence.—Admissions.*—An instruction to the effect that evidence of oral admissions should be scrutinized closely because of the possibility that the party might not have expressed himself clearly, and that the witness might not hear or repeat correctly, is erroneous.
Newman v. Hazelrigg, 73
2. *Practice.*—It is not error to refuse a special instruction when the general instructions given embraced the principles of law asserted in the special instruction asked.
Nicoles v. Calvert, 316
3. *Same.—Construction.*—An instruction is not to be judged by detached clauses, but if, when considered as an entirety, it states correct propositions of law, it will be upheld.
Ib.
4. *Time for Submitting Instructions.*—A party, who desires special instructions to be given to the jury, must deliver them to the court before the argument to the jury commences, and is not entitled to have any consideration given to his instructions offered later.
Hege v. Newsom, 426
5. *Supreme Court.*—Instructions to the jury are construed by the Supreme Court, with reference to each other and as an entirety; and if, thus construed, they present the law fairly and correctly, and are not calculated to mislead, they will afford no sufficient ground for the reversal of the judgment, although some of the expressions therein, if they stood alone, might be erroneous.
Slout v. State, 407; *Goodwin v. State*, 550; *McCarty v. Waterman*, 594

INSURANCE.

See AUDITOR OF STATE, 1, 2.

INTENTION.

See CRIMINAL LAW, 3, 48; WILL, 1.

INTEREST.

See MORTGAGE, 12.

INTERPLEADER.

See PROMISSORY NOTE, 2.

INTERROGATORIES TO JURY.

See NEGLIGENCE, 3.

The court may refuse to send interrogatories to the jury which the attorney of the opposite party has had no opportunity to see until after he has closed his argument.
Wabash, etc., R. W. Co. v. Tretta, 450

INTOXICATING LIQUOR.

See CRIMINAL LAW, 35.

1. *Granting License to Sell.—Remonstrance.—May be Filed Before County Commissioners Only.*—The remonstrance provided for by section 5314, R. S. 1881, against the granting of license to sell intoxicating liquors, must be presented to the board of county commissioners; and it is not error for the circuit court to refuse to permit a person to become a remonstrant when the cause is pending therein on appeal.
List v. Padgett, 126
2. *Same.—Qualification of Remonstrator.—Privilege to Remonstrate Lost by Removal from Township.*—If one remonstrating under said statute, during the pendency of the cause after the filing of his remonstrance, cease to be a voter of the township for which the license is sought, he will thereby lose the personal privilege of being a remonstrant, and there will be no error in dismissing his remonstrance and refusing him permission to further resist as a remonstrant the granting of the license.
Ib.
3. *Selling Without License.—Indictment.*—An indictment for selling intoxicating liquor without license, under section 5312, R. S. 1881, which shows a sale of "less than a quart," is sufficient, without alleging that the sale was made at one time.
Mullen v. State, 304
4. *Same.—Evidence.—Beer.*—An inference by the jury that "beer," sold in a saloon, was malt liquor will not be held unwarranted by the Supreme Court.
Ib.
5. *Sale to Minor.—Evidence.*—As to evidence held sufficient to warrant a conviction for a sale of intoxicating liquor to a minor under section 2094, R. S. 1881, see opinion.
Stultz v. State, 456
6. *Unlawful Sale of Beer.—Evidence.—Presumption.*—Where the defendant is prosecuted for an unlawful sale of intoxicating liquor, and upon the trial the evidence shows a sale of beer under circumstances which would make the sale unlawful if the beer was intoxicating, it will be presumed, in the absence of evidence to the contrary, that the beer so sold was a malt or an intoxicating liquor.
Stout v. State, 407

JOINDER OF CAUSES.

See CONTRACT, 6.

JUDGE.

See CRIMINAL LAW, 17.

JUDGMENT.

See CRIMINAL LAW, 8 to 11, 17; DIVORCE; EXECUTION; MORTGAGE, 10, 12, 16, 18; NEGLIGENCE, 17; PLEADING, 10, 12; PRACTICE, 6; REAL ESTATE, ACTION TO RECOVER, 3; REPLEVIN, 2; SUPREME COURT, 4, 10, 13, 27; TELEGRAPH, 2; WILL, 3.

1. *Lien.—Priority.—Trust.—Lands.—Execution.*—Judgments are by statute liens on lands held in trust for the judgment debtor in their chronological order, and a junior judgment obtains no priority by a decree in equity subjecting the lands to execution to satisfy it, where the plaintiff in the senior judgment is not a party.
Marwell v. Vaught, 136
2. *Default.—Relief From.—Set-Off.*—Relief from a judgment by default will not be given to a party, under section 396, R. S. 1881, merely to enable him to avail himself of a set-off.
Willis v. Browning, 149
3. *Practice.—Failure to Plead.—Default.*—A failure to plead or make up issues as required justifies a judgment as upon default. R. S. 1881, section 401.
Lilly v. Dunn, 220
4. *Parties.—Judgment, Review of.*—Where a judgment is sought to be re-

viewed in the court below, all parties to the original action affected thereby must be brought into court. *Concannon v. Noble, 326*

5. *Confiscation.—Void Decree.—Jurisdiction.*—Jurisdiction of proceedings to confiscate property, under the act of Congress of July 17th, 1862, 12 U. S. Statutes at Large, 589, could not exist without a prior seizure of the property by executive order, and this must appear by the record. *Henry v. Carson, 412*
6. *Same.—Default.*—Where the owner of such property appeared and answered, and his appearance and answer were stricken out and judgment entered by default for the want of an affidavit of his loyalty, the judgment is void. *Ib.*
7. *Default.—Complaint for Relief Against.*—A complaint to set aside a judgment by default, which fails to show a specific defence to the action, is bad. *Nichols v. Nichols, 433*
8. *Same.—Summons.—Sheriff's Return.*—A sheriff's return, showing service of the summons, can not be questioned in a suit to set aside a default. *Ib.*
9. *Justice of the Peace.—Delay of Entry.*—Where a justice does not enter judgment upon a verdict immediately, as the statute requires; but delays such entry six days, the delay, though a violation of the statute, does not affect the validity of the judgment. *Martin v. Pifer, 245*

JURISDICTION.

See CITY, 4, 5; JUDGMENT, 5; MANDAMUS, 2; SUPREME COURT, 17, 24; WILL, 3.

JURY.

See CRIMINAL LAW, 1, 3, 5, 21, 29, 30, 31; INTOXICATING LIQUOR, 4.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 8; SUPREME COURT, 17.

Judgment.—Delay of Entry.—Where a justice does not enter judgment upon a verdict immediately, as the statute requires, but delays such entry six days, the delay, though a violation of the statute, does not affect the validity of the judgment. *Martin v. Pifer, 245*

LACHES.

See NEGLIGENCE, 9.

LANDLORD AND TENANT.

See DECEDENTS' ESTATES, 2.

Lease.—Renewal or Purchase.—Election.—Specific Performance.—Equity.—A lease of a lot for a term provided for the erection of a building on the lot by the lessee, and at the end of the term, the lessor could elect to renew the lease, or buy the building, or sell the lot, at a price to be ascertained by referees; the lessor failed to elect. *Held*, that the lessee could then elect, and, having chosen to purchase the lot, and the lessor refusing to join in a reference to fix the price, could maintain suit against the lessor for equitable relief. *Coles v. Peck, 333*

LAW OF THE CASE.

See SUPREME COURT, 14.

LEASE.

See CONTRACT, 1; DECEDENTS' ESTATES, 2; LANDLORD AND TENANT.

LEX LOCI.

See TAXES, 1, 2; TELEGRAPH.

LIBEL.

See **CRIMINAL LAW**, 22 to 28.

LICENSE.

See **CONTRACT**, 4, 5; **INTOXICATING LIQUOR**; **SALE**, 6, 7.

LIEN.

See **CONTRACT**, 6, 7; **DEED**, 1, 3; **JUDGMENT**, 1; **MECHANIC'S LIEN**; **MORTGAGE**, 12; **SUBROGATION**, 1; **TAXES**, 3.

LIFE-ESTATE.

See **DECEDENTS' ESTATES**, 2.

LIQUOR LAW.

See **INTOXICATING LIQUOR**.

MANDAMUS.

See **CITY**, 6, 7; **SCHOOLS**, 3.

1. *Civil Action.*—*Adequate Legal Remedy.*—*Controverted Claim.*—Where the ordinary civil action will afford the plaintiff an adequate legal remedy, and, especially, where the validity of his claim is controverted, he can not resort, in the first instance at least, to the extraordinary proceeding by mandate. *Harrison School Tp. v. McGregor*, 185
2. *Practice.*—*Jurisdiction.*—*Summons.*—*Waiver.*—In a proceeding for a mandate, jurisdiction is acquired not by summons but by an alternative writ; this writ may be waived by an appearance, and the complaint or application may be tested by demurrer. *Wren v. Indianapolis*, 206

MANSLAUGHTER.

See **CRIMINAL LAW**, 3.

MARRIED WOMAN.

See **HUSBAND AND WIFE**; **WITNESS**, 2.

1. *Deed.*—*Infancy.*—*Disaffirmance of Deed.*—*Estoppel.*—A married woman may, at any time during coverture, disaffirm a deed made by her while an infant, and she is not estopped by the facts, that when the deed was executed she appeared and was believed by the grantee to be an adult, that the grantee, with her knowledge after reaching majority, improved the land, and that he had conveyed to an innocent purchaser, and that after majority she, with her husband, enjoyed and exercised dominion over the consideration received. *Buchanan v. Hubbard*, 1
2. *Parties.*—*Husband and Wife.*—A husband may unite with his wife in a suit concerning her separate property, and no averment of his interest other than the marital relation is necessary in the complaint. *Roller v. Blair*, 203
3. *Same.*—*Fraud.*—*Complaint.*—In a suit by husband and wife for fraud upon the wife, affecting her separate property, it is not necessary to aver that the husband was deceived; and where by false representations she is put off her guard, so that she does not use ordinary prudence to ascertain the facts by examining a public record of a distant county, an action will lie if the purpose of the defendant was fraudulent, and he professed to know the facts, though he did not. *Ib.*

MASTER AND SERVANT.

See **CITY**, 1, 2; **NEGLIGENCE**, 5.

MEASURE OF DAMAGES.

See **SALE**, 1.

MECHANIC'S LIEN.

Notice.—Mistake in Description.—Correction.—Pleading.—The notice of lien, by mistake, named lot 9, instead of lot 11, in block 7, in a town, but recited that the lien claimed was for lumber furnished by the plaintiffs to the contractor, and used by him in building for the defendants, recently, a brick building on the property described. The complaint, not otherwise challenged, averred the mistake, that the only building ever built for or owned by the defendants in block 7, was on lot 11, and not on lot 9, and is well known and can be identified by the description in the notice.

Held, that the complaint was good on demurrer.

Held, also, that an answer by which the defendants alleged that the contractor broke his contract, whereby the defendants suffered damage which they prayed be allowed them against the plaintiffs, was bad on demurrer.

Newcomer v. Hutchings, 119

MEMBER OF FAMILY.

See CONTRACT, 9.

MINOR.

See GUARDIAN AND WARD, 2; INTOXICATING LIQUOR, 5.

MISNOMER.

See MITTIMUS, 2; PLEADING, 9.

MISTAKE.

See COUNTY RECORDER, 2; MECHANIC'S LIEN.

MITTIMUS.

1. *Constable.—Statute Construed.*—A special constable may take a prisoner committed to jail, to the prison, though his name be not mentioned in the mittimus, notwithstanding section 1433, R. S. 1881.

Sturgeon v. Gray, 166

2. *Same.—Misnomer.—Habeas Corpus.*—The misnomer of a prisoner in a mittimus affords no reason for his discharge on habeas corpus. *Ib.*

MONEY HAD AND RECEIVED.

See GUARDIAN AND WARD, 1.

MORTGAGE.

See COUNTY RECORDER, 2; DEED; RECEIVER, 2, 4; SUBROGATION, 1.

1. *Action to Redeem.—Parties.—Joinder of Plaintiffs.*—The administrator, widow and heirs at law of a deceased mortgagee may join as plaintiffs in a suit to redeem a senior mortgage. *Lilly v. Dunn, 220*
2. *Same.—Foreclosure.—Statute of Limitations.*—A suit to foreclose a mortgage, not containing a covenant to pay, is barred when the debt secured by it is barred, and, when so barred, a suit by the mortgagee or his representatives to redeem a senior mortgage is also barred. *Ib.*
3. *Same.—Indemnifying Mortgage.*—A suit to foreclose a mortgage given to indemnify the mortgagee on account of liability as surety for the mortgagor, but containing no covenant to pay, is barred by the statute, R. S. 1881, section 292, in six years from the time a cause of action accrues thereon. *Ib.*
4. *Equitable Estate.*—The owner of an equitable estate may mortgage the same, and such estate may be sold upon a foreclosure. *Burkam v. Burk, 270*
5. *Same.—Foreclosure.—Misdescription.—Reformation.*—Where a mortgage misdescribes the land, the same may be reformed and foreclosed, notwithstanding the fact that it has already been foreclosed by such mistaken description. *Ib.*

6. *Construction of Contract.—Assignment of Certificate, of Stock in Building Association.*—A mortgage "to secure the payment, when the same becomes due, of three shares in the M. Loan, etc., Association" (which had been assigned by the mortgagor to the mortgagee), "in value, when the same matures, of \$600. The mortgagor agrees to pay promptly to the association all dues on said shares; that upon his failure to do so the mortgagee may foreclose, as a part of the purchase-money, for all dues necessary to complete said shares to make them par. This mortgage is to secure the purchase-money for the property herein described, and the mortgagor agrees to pay said sum above secured," secures only the payment of the dues necessary to secure to the mortgagee the shares assigned to him, and not the payment of \$600 by the association upon maturity of the stock. *Whipperman v. Smith, 275*
7. *Assumption of Payment of Mortgage Debt.—Conveyance.—Principal and Surety.—Vendor and Vendee.*—A grantee of real estate, the deed of conveyance to whom contains a stipulation for his assumption of a debt secured by mortgage thereon, which debt his grantor is personally bound to pay, becomes, by the acceptance of such deed, personally bound to the mortgage creditor; as between such grantee and his grantor, the former becomes the principal debtor, while the latter becomes a surety. *Ellis v. Johnson, 377*
8. *Same.—Foreclosure.—Pleading.—Exhibits.—Deeds.—Suit by Assignee of Mortgage Debt.—Effect as to One Grantee of Release of Another Grantee.*—A. executed his mortgage on each of a number of town lots, to secure his notes given for the purchase-money thereof. He sold an undivided one-third interest in the lots to B., who was to pay one-third of the notes, and on sale of the lots, to share in that ratio in the profits and losses, the title to remain in A. for the benefit of A. and B. They sold, and A. conveyed, the lots to C., who sold and conveyed a portion of them to D. and the remainder to F. D. afterwards sold and conveyed his portion to F. By each of the deeds of conveyance, the grantee, as part of the purchase-money, assumed and agreed to pay the notes secured by the mortgages on the lots conveyed to him. The notes becoming due and remaining unpaid, A. and B. furnished money to G. to pay the notes and mortgage and procure assignments thereof to G. as trustee for A. and B. G. paid the money to the assignee and holder of the notes and mortgages, and procured him to assign the notes to G., who, having notified the persons who had assumed the notes and mortgages that he accepted their assumptions, and having demanded payment of them, brought his suit as such trustee against F. to foreclose the mortgages, and for personal judgment on the notes against F. *Held*, that it was not necessary in such suit, for the purpose of enforcing against F. his assumption of the debt, to exhibit, as parts of the complaint, the deeds of conveyance to said grantees prior to F., and not necessary for the foreclosure of the mortgage to exhibit any of said deeds of conveyances. *Held*, also, that whatever may have been the effect as against F. of the agreement between A. and B., the actual assignment to G. gave him a right of action as trustee of A. and B. *Held*, also, that the fact that after the conveyance by D. to F., and before notice to F. of such acceptance by G., C., for a valid consideration, released D. from his liability on his said assumption, would not operate to release F., the principal debtor, from his liability to G. *Id.*
9. *Mortgage of Indemnity.—Express Agreement to Pay Debt.—Foreclosure.*—Where an indemnifying mortgage contains an express agreement of the mortgagor to pay the debt therein described, upon his failure to pay when his liability is ascertained and fixed, and the debt is due, the mortgagee may at once, without having paid such debt or any part thereof, maintain an action for the foreclosure of the mortgage and

may recover therein, as damages, actual compensation for the total probable loss. *Malott v. Goff, 496*

10. *Foreclosure.—Counter-Claim.—Junior Incumbrance.—Judgment.*—In a suit to foreclose a mortgage, making defendant a subsequent mortgagee whose demand is not due, a counter-claim by such defendant, asserting his mortgage, with a view to its adjustment and such a decree as will protect his rights, will resist a demurrer by the mortgagor.

Buchanan v. Berkshire Life Ins. Co., 510

11. *Same.—Construction of Mortgage.—When Due at Option of Mortgagee.—Notice.—Waiver.—Promissory Note.*—A mortgage was given to secure a note for a principal sum, and coupon notes for interest, due semi-annually in succession. The principal note recited that interest thereon was paid by the coupons. The mortgage provided that a failure to pay any coupon at maturity, or taxes on the mortgaged property, should, at the option of the mortgagee, make the mortgage debt due and collectible.

Held, that the commencement of a suit to foreclose for the whole debt was a sufficient exercise of the mortgagee's option, and that notice to the mortgagor of this election, before suit brought, need not be alleged or proved.

Held, also, that the recital in the principal note was not a waiver of the right of option given by the mortgage. *Ib.*

12. *Same.—Harmless Error.—Counter-Claim.—Judgment.—Interest.—New Trial.—Evidence.*—In a suit to foreclose a mortgage, the mortgagor, junior mortgagees, and one who had purchased the premises at a sale for taxes, were made defendants. The latter filed a counter-claim, asserting a lien superior to those of all the other parties; upon which issues were formed by the mortgagor and the other parties, and this part of the cause was ordered to be tried separately, and a continuance thereof granted; while the other issues, including those upon counter-claims filed by the junior mortgagees, were tried. It did not appear whether any or what disposition had ever been made of the issues thus continued for trial.

Held, that the record did not show any injury to the mortgagor by this proceeding, and, therefore, he could not question it in the Supreme Court.

Held, also, that though the claims of the junior mortgagees were not matured when the counter-claims were filed by the junior mortgagees, yet, having been amended afterwards so as to allege their maturity, a personal judgment for such of them as were due at the time of trial, and a decree of foreclosure for such as were not due, with proper rebate of interest, was not erroneous.

Held, also, that any error in fixing the amount of rebate of interest was not reached by a motion for a new trial.

Held, also, that no question as to the sufficiency of the evidence to support a decree that the mortgaged property was indivisible is presented by an ordinary motion for a new trial of the whole case; but in such case there should be a request for a special inquiry on that subject, and exception to such finding and decree as may be made upon it, so that the question may be made separately. *Ib.*

13. *Same.—Receiver.—Practice.*—Where a receiver has been properly appointed in a suit for the foreclosure of a mortgage, there is no error in continuing the receivership after final decree of foreclosure, nor is any question concerning it presented by a motion for a new trial. *Ib.*

14. *Same.—Rents.*—Pending a suit to foreclose a mortgage, if the mortgaged premises be indivisible, the debtor insolvent, and the property sold for taxes, a junior mortgagee defendant, whose debt is not due, having filed a counter-claim setting up his demand, may, on petition showing the facts, and that the property is less in value than the

- amount of the incumbrances, have an interlocutory order appointing a receiver to collect rents. *Ib.*
15. *Same.*—*Continuance.*—*Evidence.*—*Affidavit.*—To a petition, pending a cause, for a receiver, no formal answer is authorized, nor is a refusal to continue the hearing any error, where it does not appear that the facts can be controverted; nor is any formal pleading proper, and the court may refuse to hear oral evidence, the proper practice requiring affidavits. *Ib.*
 16. *Same.*—*Appeal.*—In such case the statute, R. S. 1881, section 1231, authorizing an appeal from an interlocutory order appointing a receiver, does not preclude a review of the question upon a general appeal after final judgment in the cause. *Ib.*
 17. *Same.*—*Promissory Note.*—*Assignment.*—The assignor of a promissory note is not personally liable therefor, where there has been no effort to collect it from the maker and no proof of his insolvency; but if it be one of several notes secured by a mortgage executed to him, a decree of foreclosure against him is proper, in the absence of proof that he has assigned all the notes so secured. *Ib.*
 18. *Same.*—*Harmless Error.*—*Demurrer.*—A defendant, whose demurrer to a complaint to foreclose a mortgage has been overruled, but against whom no judgment has been rendered, and who is shown by the evidence to have no interest in the property, is not harmed by the error, and can not complain in the Supreme Court. *Ib.*
 19. *Subrogation.*—*Agreement.*—Where an assignee of the equity of redemption pays and takes up one of several notes secured by mortgage, under an agreement with the mortgagee that he may hold them in the same manner as the mortgagee held them, he is entitled to the same priority of lien that a stranger would have who took an assignment thereof. *Morrow v. U. S., etc., Co., 21*

MUNICIPAL CORPORATION.

See CITY; NEGLIGENCE, 1 to 8; SCHOOLS.

MURDER.

See CRIMINAL LAW, 31.

NAME.

See CRIMINAL LAW, 13; MITTIMUS, 2; PLEADING, 9.

NEGLIGENCE.

- See CITY, 1 to 3, 8, 9; CONTRACT, 10; GUARDIAN AND WARD, 2; PLEADING, 12; RAILROAD, 1 to 3.
1. *Bridges.*—*Complaint.*—*County Commissioners.*—*Notice.*—In a complaint against a county for injury resulting from a defective bridge negligently permitted to become so by the rotting of its timber, it is not necessary to aver that the board had notice of the condition of the bridge. *Board, etc., v. Bacon, 31*
 2. *Same.*—*Township.*—*Repair of Bridges.*—An answer in such case, that the bridge had been built and always maintained by the township and its supervisors, and that they had sufficient means to keep it in repair, is bad on demurrer. *Ib.*
 3. *Same.*—*Verdict.*—*Answers to Interrogatories.*—Findings in answer to interrogatories, that no defect in the bridge was apparent, and, also, that the plaintiff had, on the day before the injury, examined it, are not inconsistent with a general verdict for the plaintiff. *Ib.*
 4. *Same.*—*Highway.*—*User.*—*Dedication.*—*Instructions.*—*Evidence.*—*Harmless Error.*—Where in such action the evidence shows without dispute that the bridge was located on a highway which has been used as such

for more than twenty years, an instruction that fifteen years' public use makes a highway, though erroneous, is harmless, the verdict being clearly right on the evidence. *Ib.*

5. *City.—Co-servants.*—The rule that a master is not liable to a servant for an injury resulting from the negligence of a fellow servant is not applicable to a suit against a municipal corporation.
Turner v. Indianapolis, 51
6. *Same.—Streets.*—A fireman, in assuming the duties of his place, takes upon himself no risk arising out of negligence on the part of those in charge of the streets. *Ib.*
7. *Same.—Complaint.—Notice.*—In a complaint against a city for an injury caused by an obstruction in a street, it is not enough to allege that the city had negligently left the obstruction in the street, but it must also appear that it had notice of the obstruction, or that it ought to have had such notice. *Ib.*
8. *Bridges.—Duty to Repair.—Liability of Counties under Act of 1881.*—County bridges are under the control of the board of commissioners, and for negligence in suffering them to get out of repair the county is liable, and this liability is not changed by the act of 1881.
Patton v. Board, etc., 131
9. *Laches.—Delay in Bringing Suit.—Limitation.—Written Contract.—Complaint.*—Mere delay in bringing suit upon a written contract does not constitute such laches on the part of the plaintiff as will render his complaint bad on a demurrer thereto for the want of sufficient facts, and especially so, where the action is brought within the period prescribed by the statute of limitations. *Harrison School Tp. v. McGregor, 185*
10. *Railroad.—Carriers of Passengers.—Injuries Resulting in Death.—Proximate Cause.*—Where an injury to a passenger, caused by the negligence of the carrier, is such as to render the system of the injured man liable to take on disease and to so enfeeble the system as to make it less likely to resist the inroads of the disease when it does set in, and death results, the death is, in legal contemplation, attributable to the negligence of the carrier. *Terre Haute, etc., R. R. Co. v. Buck, 346*
11. *Same.—Intervening Agency.*—Where the result of an injury is such as might have been expected to occur in the ordinary or natural course of events, the carrier is not relieved from responsibility although there may have been some intervening agency contributing to the result. *Ib.*
12. *Same.—Duties.—Degree of Care Required.*—A carrier of passengers is held to the exercise of the highest degree of care to secure the safety of passengers, and is liable to a passenger who is himself without fault, for an omission or failure to exercise this care. *Ib.*
13. *Same.—Duty to Stop Trains at Stations.*—A carrier of passengers is bound to provide reasonably safe places for passengers to alight from trains, and is bound to stop at regular stations for a sufficient length of time to permit passengers, using reasonable care, to alight with safety. *Ib.*
14. *Same.—Invitation to Alight.*—Bringing a train to a full stop near the regular station, after having given the usual signal indicating the arrival at the station, is an implied invitation to the passenger to alight. *Ib.*
15. *Same.—Contributory Negligence.*—A passenger is not necessarily guilty of contributory negligence, who, without knowledge of the dangerous place at which a train has stopped, and in a dark night, steps from a train which has been brought to a full stop, near the usual stopping place, at the regular time for stopping, and after the customary signal for stopping has been given. *Ib.*

16. *Same.—Presumption of Negligence.—Burden of Proof.*—Where a railroad train is run past a regular station, and brought to a full stop on a dangerous trestle-work, the presumption is that there was negligence, and the burden is cast upon the carrier of showing that there was not. *Ib.*
17. *Pleading.—Arrest of Judgment.*—A complaint to recover for an injury from a vicious animal, which fails to show that the plaintiff was free from fault, is bad on motion in arrest of judgment.

Eberhart v. Reister, 473

NEW TRIAL.

See DEMURRER TO EVIDENCE; MORTGAGE, 12, 13; SUPREME COURT, 5, 11, 22; VERDICT.

NOMINAL DAMAGES.

See DECEDENTS' ESTATES, 1.

NON-RESIDENT.

See NOTICE, 1; TAXES, 1.

NOTICE.

See CITY, 3 to 5; COUNTY RECORDER, 2; DRAINAGE; EXECUTION, 10; MECHANIC'S LIEN; MORTGAGE, 11; NEGLIGENCE, 1, 7; REAL ESTATE, ACTION TO RECOVER, 1; VENDOR AND VENDEE, 2.

1. *Non-Resident.—Publication.—Affidavit.*—An affidavit that a defendant is a non-resident of the State, and a necessary party, and that the action is in relation to real estate, was, under section 38, 2 R. S. 1876, p. 49, sufficient to warrant notice by publication.

Hamilton v. Barricklow, 398

2. *Sheriff's Sale.—Publication of Notice.—Computation of Time.*—The notice of a sheriff's sale to occur February 14th, published in a newspaper January 24th and 31st, and February 7th, is sufficient under the statute, sections 757 and 1280, R. S. 1881.

Hill v. Pressley, 447

OFFICE AND OFFICER.

See AUDITOR OF STATE; COSTS; COUNTY AUDITOR; COUNTY COMMISSIONERS; COUNTY RECORDER; COUNTY SCHOOL SUPERINTENDENT; COUNTY TREASURER; CRIMINAL LAW, 1, 14, 25; MITTIMUS, 1; NEGLIGENCE, 1, 2, 8; SCHOOLS, 2, 3.

OFFICIAL BOND.

See COUNTY RECORDER.

OPINION.

See CRIMINAL LAW, 35, 39; EVIDENCE, 5; HIGHWAY, 1.

OWNERSHIP.

See COUNTY TREASURER; EVIDENCE, 6; EXECUTION, 9; PROMISSORY NOTE, 2; TAXES, 1.

PARENT AND CHILD.

See DIVORCE.

PARTIES.

See ASSIGNMENT OF ERROR, 4; CITY, 6; INTOXICATING LIQUOR, 1, 2; JUDGMENT, 1, 4; MARRIED WOMAN, 2; MORTGAGE, 1; PLEADING, 4; SUPREME COURT, 18, 19, 26; VERDICT; WITNESS, 1.

PARTITION.

See EVIDENCE, 7, 8.

1. *Bill of Exceptions.—Report of Commissioners.*—A bill of exceptions is necessary to present, in the Supreme Court, error of the court below in refusing to set aside a report of commissioners in partition.

Radcliff v. Radford, 482

2. *Evidence.—Tax Duplicate.—Parol Partition.*—Where it is in controversy whether a parol partition had been made, the tax duplicate showing that the lands were taxed to the respective persons to whom they were supposed to have been allotted, is admissible in evidence as tending to show the partition. *McSweeney v. McMillen, 298*
3. *Same.—Declarations of Ancestor.—Heir.—Title.*—Where, in partition, the title is in question, declarations of an ancestor from whom a party claims by descent, to the effect that the ancestor had no title, are admissible against such heir. *Ib.*

PARTNERSHIP.

Suit against Copartner.—Complaint.—Even after dissolution a suit by a partner against his copartner, to recover for an amount unadjusted due out of copartnership assets, will not lie until debts due it have been collected and those against it have been paid, unless there are none, or some disposition has been made of them, and a complaint not showing these facts is bad on demurrer. *Lang v. Oppenheim, 47*

PERSONAL PROPERTY.

See CONTRACT, 4, 5, 10; COUNTY TREASURER; DECEDENTS' ESTATES, 2; EVIDENCE, 6; REPLEVIN, 2; SALE; TAXES.

PLEADING.

See ACCOUNT; CITY, 3, 4, 7; CONTRACT, 1, 6, 10; CONVERSION; COUNTY COMMISSIONERS, 3, 6; CRIMINAL LAW, 5, 12 to 14, 18, 50; DECEDENTS' ESTATES, 1; DEED, 1; EXECUTION, 1, 2, 5, 6, 9; GUARDIAN AND WARD, 1; INFANCY; INTOXICATING LIQUOR, 3; JUDGMENT, 3; MARRIED WOMAN, 2, 3; MECHANIC'S LIEN; MORTGAGE, 8, 10, 12, 14; NEGLIGENCE, 1, 2, 7, 9, 17; PARTNERSHIP; PRACTICE, 4, 6; PRINCIPAL AND SURETY; PROMISSORY NOTE, 1, 2, 6, 9; RAILROAD, 1 to 3; RECEIVER, 1, 3, 4; REPLEVIN, 2; SUBROGATION, 2; TAXES, 3; TELEGRAPH, 2; VENDOR AND VENDEE, 2.

1. *Facts, how Alleged.*—In pleading under the code, facts must be shown by direct averment, and the statement of evidence, from which the necessary facts might be inferred by a jury, is not enough. *Wabash, etc., R. W. Co. v. Johnson, 40*
2. *Each Paragraph Sufficient.*—Each paragraph of answer must state facts sufficient to constitute a defence to the action, and the omission of necessary facts, in one paragraph, can not be cured or supplied by reference to the allegations of another paragraph. *Lynn v. Crim, 89*
3. *Complaint.—Demurrer.—Defective Record.*—Where the ruling of the court upon a demurrer to the complaint is assigned as error, and the record is defective in that the demurrer is not set out therein, the error is not available for the reversal of the judgment, for the reason that the cause of demurrer is not apparent. *Harrison School Tp. v. McGregor, 185*
4. *Complaint.—Defect of Parties.*—If a defect of parties does not appear by the averments of a complaint, a demurrer for that cause must be overruled. *Crawfordsville v. Bond, 236*
5. *Same.—Demurrer.—Harmless Error.*—Where the general denial is pleaded, other paragraphs of answer, only alleging facts which are provable under the general denial, are useless, and there can be no available error in sustaining demurrers to them. *Ib.*
6. *Complaint.—Practice.*—Overruling a demurrer to a bad paragraph of a complaint, though there be others which are good, embracing the same averments, is always a fatal error available to the defendant. *Weir v. State, ex rel., 311*
7. *Joint Demurrer.—Practice.*—A demurrer "to the first and second paragraphs of the complaint, for the reason that the same, and neither

one of the same, constitute a cause of action," is joint to both paragraphs, and if either be good the demurrer should be overruled.

Cooper v. Hayes, 386

8. *Demurrer.—Practice.*—A demurrer for want of facts to an answer should be sustained to the complaint if it be bad.
Nichols v. Nichols, 433; Newcomer v. Alexander, 453
9. *Misnomer.—Demurrer.*—Objection to a petition for the allowance of a claim against a receiver, on account of the omission to state the christian name of the claimant, is not properly raised by a demurrer.
Morningstar v. Wiles, 458
10. *Arrest of Judgment.*—Where a complaint fails entirely to aver a fact essential to the plaintiff's right of recovery, and contains nothing from which that fact might be inferred by liberal intendment, the judgment should be arrested.
Eberhart v. Reister, 478
11. *Written Instrument.—Copy.*—Where several paragraphs of a pleading are founded upon the same written instrument, each professing to set out a copy thereof, one copy filed with the pleading is sufficient for all the paragraphs.
Scotten v. Handolph, 581
12. *Negligence.—Arrest of Judgment.*—A complaint to recover for an injury from a vicious animal, which fails to show that the plaintiff was free from fault, is bad on motion in arrest of judgment.
Eberhart v. Reister, 478
13. *Duplicity.*—A pleading must proceed on a definite theory, must be good on that theory, and must be judged by its general tenor and scope.
Western, etc., Co. v. Reed, 196

POSSESSION.

See REAL ESTATE, ACTION TO RECOVER; 2, VENDOR AND VENDEE, 3.

PRACTICE.

- See ASSIGNMENT OF ERROR; BASTARDY; CHANGE OF VENUE; CONTINUANCE; COURTS; CRIMINAL LAW, 8, 9, 11, 12, 15, 16, 18, 21, 37; DECEDENTS' ESTATES, 3; DEMURRER TO EVIDENCE; EVIDENCE, 1, 3, 9, 13; EXECUTION, 4 to 6; HABEAS CORPUS; INSTRUCTION TO JURY; INTERROGATORIES TO JURY; JUDGMENT, 3; MANDAMUS, 2; MORTGAGE, 12 to 16, 18; NEGLIGENCE, 3, 4; NOTICE, 1; PARTITION; PLEADING, 3, 5 to 10; PROMISSORY NOTE, 2; RECEIVER, 2, 3; SUPREME COURT; VERDICT.
1. *Motion to Stay Proceedings.—Counter Affidavits.—Costs.—Discretion of Court.*—Upon affidavit an order was made to stay proceedings in a cause until the costs of a former suit for the same cause of action should be paid. After a delay of seventeen days the plaintiff offered to file a counter affidavit, not accounting for his delay. The refusal of leave was not error.
Jones v. Johnson, 202
 2. *Evidence after Argument.*—It is in the discretion of the court, for the furtherance of justice, to permit the introduction of omitted evidence after the close of the argument.
Breedlove v. Bundy, 319
 3. *Same.—Recalling Jury for Instructions.*—The court may, after the retirement of the jury, recall it and give further proper instructions. *Id.*
 4. *Demurrer.*—A joint demurrer to several paragraphs of an answer must be overruled if one of the paragraphs is good.
Cooper v. Hayes, 386; Nichols v. Nichols, 433
 5. *Motion to Strike Out.—Harmless Error.*—The refusal to strike out part of a complaint is a harmless error. *Wabash, etc., R. W. Co. v. Tretts, 450*
 6. *Judgment for Failure to Plead.*—Where no rule to reply has been taken, a defendant is not, under the code, entitled to judgment for want of a reply.
Buchanan v. Berkshire, etc., Ins. Co., 510

7. *Striking out Testimony.—Overruling Motion.—Error.*—There is no error in overruling the plaintiff's motion to strike out the entire testimony of a witness, of which he can be heard to complain, when it appears that he elicited and introduced much of the testimony of such witness. His motion was too comprehensive. *McCurly v. Waterman, 534*
8. *Same.—Instructions.*—Where all the instructions contain a fair and correct statement of the law applicable to the issues and the evidence, and are not calculated to mislead, the judgment will not be reversed thereon, even though one of them, standing alone, might seem to be erroneous. *Ib.*
9. *Argument of Counsel.—Reading Law to Jury.*—As the Constitution of this State, in all criminal causes, makes the jury the ultimate judges of the law, there is no error in permitting counsel, in argument to the jury, to read and discuss the law applicable to the case. *Stout v. State, 407*
10. *Evidence.—Discretion of Court.—Supreme Court.*—The trial court may permit the State to introduce evidence after the defendant has closed his evidence, and the Supreme Court will not reverse a judgment unless the trial court has abused its discretionary power in this respect. *Goodwin v. State, 550*

PRESUMPTION.

See CHANGE OF VENUE; CRIMINAL LAW, 17, 19, 43; INFANCY; INTOXICATING LIQUOR, 6; NEGLIGENCE, 16.

PRINCIPAL AND AGENT.

See CORPORATION.

PRINCIPAL AND SURETY.

See COUNTY RECORDER; EXECUTION, 10; MORTGAGE, 3, 7, 8.

Pleading.—Answer.—Set-Off.—To an action on a joint promissory note, an answer by way of set-off, by one of two or more defendants, must allege that he is principal, and his co-defendants are his sureties, in the plaintiff's cause of action; otherwise the answer is insufficient on demurrer. *Lynn v. Crim, 89*

PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

See EXECUTION, 7, 8.

PROMISE.

See FRAUDULENT CONVEYANCE, 2, 3.

PROMISSORY NOTE.

See FRAUDULENT CONVEYANCE, 2, 3; MORTGAGE, 11, 17; SUBROGATION, 1.

1. *Procurement by Fraudulent Representations.—Defence.—Consideration.—Pleading.*—To a suit on a promissory note, an answer is good which alleges that the note sued on was obtained by presenting to the defendant certain notes and receipts made by the defendant to the plaintiff twenty-five years before, with false credits endorsed thereon, and representing that all were valid and binding, with a threat to sue thereon; that the defendant was very aged, and the transaction concerning the execution of the papers had wholly passed from his memory, and he believed the plaintiff's representations, that the plaintiff had fraudulently and quietly waited until the defendant would forget, for the purpose then of imposing, as aforesaid, on the defendant with said papers; that in fact said notes and receipts were made for goods at the time delivered to the defendant temporarily for the plaintiff's accommodation, all of which were in a few days returned to the plaintiff, and the notes and receipts were to be cancelled, all which the plaintiff well knew when the note in suit was given, which was done in settlement of a part thereof. *Cross v. Herr, 96*

2. *Ownership.—Assignor and Assignee.—Interpleader.—Practice.*—In a suit by an assignee of a promissory note, it is not error to permit another, who claims ownership of the note, to intervene by counter-claim, and assert his right thereto. *Kustner v. Pibilinski, 229*
3. *Same.—Assignment.—Fraud.*—The payee of a non-commercial promissory note, being unable to read or write, and desiring after its maturity to assign it to his daughter as a marriage portion, the prospective son-in-law A., deceiving him as to the terms of the endorsement, fraudulently procured an assignment to himself, and afterwards assigned the note to a *bona fide* purchaser for value.
Held, that the daughter, and not the assignee of A., was entitled to the proceeds of the note. *Ib.*
4. *Assignee of Note not Payable in Bank.*—The assignee of a promissory note not payable in bank takes it subject to defences existing before notice of assignment. *Second Nat'l Bk. v. Brady, 498*
5. *Payable in Bank in this State.—Inland Bill of Exchange.*—Under section 5506, R. S. 1881, a promissory note payable to order or bearer in a bank in this State is negotiable as an inland bill of exchange, and the endorsee of such a note for a valuable consideration, before maturity and without notice, takes the same free from any equities or defences which might exist as between the maker and the payee thereof. *Scotten v. Randolph, 581*
6. *Same.—Defences.—Failure of Consideration.—False Representations.—Want of Consideration.—Error.*—In an action by the endorsee against the maker of such a note, it is error to sustain a demurrer to a paragraph of answer, alleging facts which show that the consideration of the note had wholly failed before its endorsement, and that the endorsee had knowledge of such facts before the note was endorsed to him; and such error is not rendered harmless because of the fact that issues were joined upon other paragraphs of answer, one alleging that the note was obtained from the maker by certain false and fraudulent representations, and the other averring that the note was executed without any consideration therefor. *Ib.*
7. *Consideration.—Promise to Reconvey.*—Where a grantee in a deed executed to defraud creditors reconveys the property solely in consideration of the verbal promise made at the time of the first conveyance, and non-commercial promissory notes are executed at the time of the reconveyance to give color to the transaction, there is no consideration for such notes. *Second Nat'l Bank v. Brady, 498*
8. *Same.—Legality of Consideration.*—Notes executed at the time a reconveyance of the land is made by the grantee to the fraudulent grantor, pursuant to the verbal agreement made during the original transaction, are not tainted by the illegality of that transaction. *Ib.*
9. *Pleading.—Set-Off.—Principal and Surety.*—To an action on a joint promissory note, an answer by way of set-off, by one of two or more defendants, must allege that he is principal, and his co-defendants are his sureties, in the plaintiff's cause of action; otherwise the answer is insufficient on demurrer. *Ib.*

PUBLICATION.

See DRAINAGE; NOTICE; SHERIFF'S SALE.

QUIETING TITLE.

See TAXES, 3; VENDOR AND VENDEE, 2.

RAILROAD.

See NEGLIGENCE, 10 to 16.

1. *Escape of Fire.—Contributory Negligence.—Complaint.*—In a suit against

a railroad company to recover for property destroyed by fire, the complaint must show by direct averment, that there was no negligence by the plaintiff contributing to the injury, and the allegation that the fire was suffered to escape without the fault of the plaintiff, is not sufficient. *Wabash, etc., R. W. Co. v. Johnson, 40*

2. *Fire Escaping from Locomotive.—Complaint.—Negligence.*—In an action by an adjoining proprietor against a railroad company for damage to the plaintiff's property caused by fire escaping from the defendant's locomotives, the complaint should not only allege negligence on the part of the defendant, but also that the plaintiff was without negligence. *Wabash, etc., R. W. Co. v. Johnson, 44*
3. *Escape of Fire.—Negligence.—Complaint.*—A complaint against a railroad company, charging that the defendant negligently and without fault of the plaintiff, allowed fire to escape from its locomotive, whereby the plaintiff's property was burned, is bad on demurrer, because it does not show that the plaintiff's negligence did not contribute to the injury. *Wabash, etc., R. W. Co. v. Johnson, 68*
4. *Fencing.—Killing Stock.*—In a suit, under the statute, against a railroad company for killing stock, the material question is as to the fence at the place where the animals entered, and not at the place where they were killed. *Wabash, etc., R. W. Co. v. Tretts, 450*
5. *Same.—Duty to Fence Road.*—The obligation of a railroad company to fence its track exists except at places where a fence would impair the use of private property or the rights of the public, and it includes the duty of maintaining cattle-guards where they are necessary and proper to prevent access from intersecting highways. *Ib.*

REAL ESTATE.

See CONTRACT, 4, 6, 7; DEED; EVIDENCE, 7, 8, 10; EXECUTION, 1, 5, 6, 7, 8; HUSBAND AND WIFE; JUDGMENT, 1; MARRIED WOMAN; MORTGAGE; PARTITION; REAL ESTATE, ACTION TO RECOVER; REDEMPTION; SALE, 6, 7; SUBROGATION, 1; TAXES, 3; VENDOR AND VENDEE.

REAL ESTATE, ACTION TO RECOVER.

1. *Sheriff's Sale.—Notice to Quit, as to Judgment Debtor.—Demand.*—An execution defendant, remaining in possession of lands sold at sheriff's sale, is not a tenant entitled to notice to quit, nor need a demand for possession precede a suit in ejectment. *Griffin v. Rochester, 545*
2. *Same.—Right of Possession.—Vendor and Purchaser.—Executory Contract.*—An executory contract for the purchase of land, which is silent as to the right of possession, does not give that right to the purchaser. *Ib.*
3. *Same.—Judgment.*—A judgment in ejectment by the vendor, against the vendee of land, under an executory contract, does not interfere with any remedies to which the purchaser may be entitled upon the subsequent performance of his contract. *Ib.*

RECEIPT.

See CONTRACT, 8.

RECEIVER.

See MORTGAGE, 13 to 16; PLEADING, 9.

1. *Right to Sue.—Complaint.*—A complaint against a receiver as such, upon a money demand, which does not allege that leave to bring the suit has been granted by the proper court, is bad on demurrer. *Keen v. Breckenridge, 69*
2. *Evidence.—Practice.—Mortgage.*—The Supreme Court will not, in an ap-

plication for the appointment of a receiver in an action to foreclose a mortgage, disturb the conclusion reached by the trial court as to the sufficiency of the mortgaged property to discharge the debt.

Pouder v. Tate, 330

3. *Same*.—*Demurrer*.—It is not error to refuse to permit a demurrer to be filed to such an application. *Id.*
4. *Same*.—*Petition for Foreclosure*.—Where, in the foreclosure of a mortgage, the appointment of a receiver is asked, it is not essential to aver in the petition that the mortgagor is insolvent. *Id.*

RECORD.

See COUNTY COMMISSIONERS, 4, 7; CRIMINAL LAW, 15; JUDGMENT, 5; PLEADING, 3; SUPREME COURT, 1, 11, 16, 23, 28, 31.

REDEMPTION.

See MORTGAGE, 1, 2; SUBROGATION, 1.

Sheriff's Sale.—*When Year for Redemption Begins to Run*.—The year allowed by statute, R. S. 1881, section 768, for the redemption of real estate sold at sheriff's sale, begins to run on the day that the purchaser completes his purchase by the payment of his bid.

Liggett v. Firestone, 260

RENTS.

See MORTGAGE, 14.

REPEAL OF STATUTE.

See COUNTY AUDITOR.

REPLEVIN.

1. *Compromise*.—*Dismissal*.—*Suit on Bond*.—Where a suit in replevin is compromised and settled by the parties, and dismissed accordingly, no suit can be maintained on the replevin bond. *Gerard v. Dill*, 101
2. *Complaint to Recover Goods in Execution*.—*Exemption*.—*Judgment*.—A complaint in replevin against a sheriff by an execution defendant, alleging a taking, by levy of the writ, "though the plaintiff filed a schedule," and the property was of less value than \$600, but failing to show that the judgment on which the execution issued was founded on contract, and that the schedule was such as the law requires, is bad.

Newcomer v. Alexander, 453

RES ADJUDICATA.

See DIVORCE, 1, 2; WILL, 3.

RESCISSION.

See CONTRACT, 2; VENDOR AND VENDEE, 2.

RES GESTÆ.

See EVIDENCE, 6.

RESULTING TRUST.

See HUSBAND AND WIFE.

REVIEW OF JUDGMENT.

See JUDGMENT, 4.

SALE.

See INTOXICATING LIQUOR, 3 to 6; NOTICE, 2; SHERIFF'S SALE; TAXES, 3.

1. *Warranty*.—*Measure of Damages*.—The measure of damages for a breach of warranty as to the quality of a chattel sold is the difference between

the actual value at the time of sale and the value which the article would have had if it had been as warranted. *Hege v. Newsom, 426*

2. *Same.—Return of Article Warranted.*—The buyer, in such case, need not return or offer to return the article, in order to sustain an action for the breach of warranty, or to set it up as a defence or as a counterclaim in an action for the price. *Ib*
3. *Same.—Proof of Value.*—The price paid or contracted for by the buyer is *prima facie* the value of such an article as would have complied with the warranty. *Ib.*
4. *Same.—Burden of Proof.*—To reduce the contract price of goods sold, and kept and used by the buyer, under his claim of a breach of warranty of their quality, the burden is upon him to show how much less than that price the goods were worth. *Ib.*
5. *Same.—Examination by Buyer.*—The owner of certain standing trees pointed out a certain number thereof to another who had full opportunity to examine them, and did examine them, and then agreed with said owner to pay him for the particular trees examined, on the basis of the number of feet which the logs from such trees would make, at a certain price per hundred feet, and nothing was said in reference to the quality of lumber they might produce. The owner thereupon cut down and delivered the trees in logs.
Held, that there was no warranty of the quality of such logs. Ib.
6. *Contract.—Sale of Building.—License to Remove.*—The sale of a building not permanently annexed to the land, with a right of removal, although the contract is verbal, justifies the purchaser, having complied with his part of the contract, in entering upon the land and removing the building. *Ib.*
7. *Same.—License.*—The sale of personal property, by an owner of real estate, which can only be removed by entry thereon, thereby licenses the vendee to enter upon the land for the purpose of removal.
Rogers v. Cox, 157

SCHOOLS.

See COUNTY SCHOOL SUPERINTENDENT; CRIMINAL LAW, 14, 25.

1. *School Township.—Corporation.—May Sue and be Sued.*—Under section 4437, R. S. 1881, each civil township, in any county in this State, is declared to be a school township, and, as such, to be a corporation by a certain name and style, "and, by such name, may contract and may be contracted with, sue and be sued, in any court having competent jurisdiction."
Harrison School Tp. v. McGregor, 185
2. *School Corporation.—Teacher's Salary.—Want of Funds.—No Defence.*—In an action by a teacher against a school corporation to recover his salary or compensation for teaching school, the fact that the corporation has no funds on hand wherewith to pay the plaintiff's claim is no defence to his action. *Ib.*
3. *School Township.—Duty of Trustee.—Mandate.*—It is the duty of the trustee of a school township to apply the tuition funds of the township, when received, to the payment of its indebtedness for tuition, and the performance of such duty by the proper trustee may be enforced by writ of mandate. *State, ex rel., v. Coopridger, 279*

SCHOOL TRUSTEE.

See CRIMINAL LAW, 14.

SET-OFF.

See CONTRACT, 9; JUDGMENT, 2; PRINCIPAL AND SURETY; PROMISSORY NOTE, 9; SUPREME COURT, 17, 24.

SHERIFF.

See EXECUTION, 5; JUDGMENT, 8.

SHERIFF'S SALE.

See REAL ESTATE, ACTION TO RECOVER, 1; REDEMPTION.

Publication of Notice.—Computation of Time.—The notice of a sheriff's sale to occur February 14th, published in a newspaper January 24th and 31st, and February 7th, is sufficient under the statute, sections 757 and 1280, R. S. 1881.

Hill v. Pressley, 447

SIGNATURE.

See CRIMINAL LAW, 13.

SPECIFIC PERFORMANCE.

See LANDLORD AND TENANT.

STATUTE CONSTRUED.

See AUDITOR OF STATE; COUNTY AUDITOR; COUNTY RECORDER, 1; CRIMINAL LAW, 9, 22, 24; DIVORCE, 1; MITTIMUS, 1; TELEGRAPH, 1; WITNESS, 1.

STATUTES OF LIMITATIONS.

See MORTGAGE, 2, 3; NEGLIGENCE, 9.

STOCK.

See MORTGAGE, 6.

STREET.

See CITY, 2, 3, 6 to 9; NEGLIGENCE, 6, 7.

SUBROGATION.

1. *Mortgage.—Agreement.*—Where an assignee of the equity of redemption pays and takes up one of several notes secured by mortgage, under an agreement with the mortgagee that he may hold them in the same manner as the mortgagee held them, he is entitled to the same priority of lien that a stranger would have who took an assignment thereof.

Morrow v. United States, etc., Co., 21

2. *Pleading.*—A complaint to enforce a right acquired by subrogation should state the facts which give rise to the right claimed.

Lilly v. Dunn, 220

SUMMONS.

See JUDGMENT, 8; MANDAMUS, 2.

SUPERIOR COURT.

See COURTS.

SUPERVISOR OF HIGHWAYS.

See NEGLIGENCE, 2.

SUPREME COURT.

See ASSIGNMENT OF ERROR; BASTARDY, 1; COURTS; CRIMINAL LAW, 3, 4, 11, 12, 15, 16, 18, 20, 37; DECEDENTS' ESTATES, 1; INSTRUCTIONS TO JURY, 3, 5; INTOXICATING LIQUOR, 4; MORTGAGE, 12, 18; PARTITION; PLEADING, 3, 5; PRACTICE, 10; RECEIVER, 2.

1. *Record.—Verdict.—Good and Bad Paragraphs.*—Where there is a general verdict for the plaintiff, the complaint being in several paragraphs, one of which was good, and as to the others demurrers were erroneously overruled, the judgment will be reversed unless it can be seen from the record that the verdict was solely upon the good paragraph.

Lang v. Oppenheim, 47

2. *Rule 19.—Waiver of Compliance with.*—The right of a party to a literal compliance with Rule 19 of the Supreme Court must be claimed before submission of the cause by agreement. *Thompson v. Deprez, 67*
3. *Criminal Law.—Escaped Convict.—Dismissal of Appeal.*—When it is shown to the Supreme Court that an appeal there pending is prosecuted in the name of a convicted defendant, who has escaped from legal custody and is at large, the appeal will be dismissed. *Sargent v. State, 63*
4. *Practice.—Reversal of Judgment.—Harmless Error.*—A judgment will not be reversed for an error in sustaining a demurrer to a paragraph of answer, when it appears that all competent evidence, under such paragraph, was admissible under another paragraph remaining in the record. Such an error is harmless. *Lynn v. Crim, 89*
5. *New Trial.*—The Supreme Court will not award a new trial when the verdict is clearly right upon the evidence. *Newcomer v. Hutchings, 119*
6. *Same.—Instructions.*—The refusal of instructions asked presents no question to the Supreme Court, unless all the instructions given are in the record. *Ib.*
7. *Same.—Brief.*—A brief, which merely states the question and does not argue it, is not sufficient. *Ib.*
8. *Briefs.*—As to what constitutes such a brief as is required by the rules of the Supreme Court in order to present a question, see opinion. *Robbins v. Magee, 174*
9. *Rehearing.*—A rehearing will not be granted to enable the appellant so to amend his assignment of errors as properly to present the questions in the record. *Ib.*
10. *Harmless Error.*—A judgment will not be reversed by the Supreme Court for an error in sustaining a demurrer to a paragraph of answer, when it appears that all competent evidence, under such paragraph, was admissible under another paragraph of answer, upon which issue was joined. *Harrison School Tp. v. McGregor, 185*
11. *Same.—Newly Discovered Evidence.—New Trial.—Affidavit.—Bill of Exceptions.*—Where newly discovered evidence is assigned as cause for a new trial, it must be sustained by affidavits, showing its truth; and, unless these affidavits are made part of the record by a bill of exceptions or an order of court, they can not be considered by the Supreme Court in determining whether or not the newly discovered evidence is a sufficient cause for granting a new trial. *Ib.*
12. *Practice.—Exception.*—No question is presented by a ruling upon a demurrer unless an exception is saved. *Burkam v. Burk, 270*
13. *Same.—Judgment.—Harmless Error.*—Where it appears affirmatively that the judgment was not rendered upon a given paragraph of a complaint, no available error was committed in overruling a demurrer to such paragraph, though the same was insufficient. *Ib.*
14. A question which has been decided by the Supreme Court on appeal, will not be considered again on a subsequent appeal of the cause. *Jones v. Castor, 307*
15. *Weight of Evidence.*—The Supreme Court will not disturb a verdict on the weight of the evidence. *Nicoles v. Calvert, 316; McCarty v. Waterman, 594*
16. *Bill of Exceptions.—Instructions.—Practice.*—Instructions to the jury, which have not been filed or directed by the court to be made part of the record, and are not in any proper bill of exceptions, are not a part of the record. *Aufdenkamp v. Smith, 323*
17. *Jurisdiction.—Amount in Controversy.—Appeal.*—On appeal to the Supreme Court of a case commenced before a justice of the peace, the

- amount in controversy is determined not alone by the complaint, but also by any set-off or counter-claim, and if it thus appears that there is more than \$50 in controversy, the appeal will lie under section 632, R. S. 1881. *Coles v. Peck, 333*
18. *Practice.—Parties.*—A party against whom no judgment has been rendered will not be heard upon assignment of errors made by him in the Supreme Court. *Hamilton v. Barricklow, 398*
 19. *Issues.—Parties.*—A party can not complain on appeal that issues were not formed between other contending parties in the same suit, where such issues could not affect the interests of such appellant; nor can such appellant complain that the appellee dismissed his suit against another defendant thereto. *Ib.*
 20. *Practice.—Trial without Reply.*—Where the parties to an action, in which there is an affirmative answer, go to trial without a reply and without any objection because of the want of a reply, the cause will be treated on appeal as if a reply in denial had been filed. *Hege v. Newsom, 426*
 21. *Same.—Demurrer.—Harmless Error.*—There is no available error in the sustaining of a demurrer to a good paragraph of answer, where there remains another paragraph substantially the same. *Ib.*
 22. *Same.—Assignment of Error.—Instructions.—Motion for New Trial.*—A refusal of the court to consider or take any action upon instructions offered by a party, if error, would be ground for a new trial, and could not, on appeal, be specially assigned as error. *Ib.*
 23. *Same.—Evidence.—Sustaining Objection to Question.—Offer of Proof.*—To render available as error the sustaining of an objection to a question propounded to a witness, the record should show that the party asking the question stated to the court what fact or facts he expected to prove. *Ib.*
 24. *Appeal.—Jurisdiction.—Amount in Controversy.*—No appeal will lie to the Supreme Court from a judgment in an action originating before a justice of the peace, under section 632, R. S. 1881, where the amount in controversy is less than \$50, exclusive of interest and costs; and when the plaintiff is content with the recovery of \$50 or less, no set-off or counter-claim having been asserted, the amount recovered will be deemed the amount in controversy, and an appeal by the defendant dismissed. *Winship v. Block, 446*
 25. *Practice.—Evidence.—Bill of Exceptions.*—To present any question to the Supreme Court as to admitting evidence, objection must be specifically stated to the court below and shown by bill of exceptions. *Wabash, etc., R. W. Co. v. Tretts, 450*
 26. *Waiver of Defect of Parties.*—The submission of a cause by agreement in the Supreme Court is a waiver of a defect of parties to the appeal. *Martin v. Orr, 491*
 27. *Judgment.—Exceptions.*—A judgment which is beyond the scope of the complaint can not be questioned in the Supreme Court unless it has been objected to below and the question saved by exception. *Buchanan v. Berkshire, etc., Ins. Co., 510*
 28. *Practice.—Pleading Rejected.—Bill of Exceptions.*—Where a motion to reject or strike out a pleading is sustained, such pleading will constitute no part of the record of the cause on appeal to the Supreme Court, unless it is made so by bill of exceptions or by an order of court. *Scotten v. Randolph, 531*
 29. *Manslaughter.—Intent.—Supreme Court.*—Where, upon a violent and unlawful attack, death soon ensues, a jury may find an intent upon the part of the assailant to kill, and the Supreme Court will not interfere

- to reduce a verdict of voluntary manslaughter to involuntary manslaughter. *Luck v. State, 16*
30. *Criminal Law.—Defective Indictment.—Refusal to Quash.—Error.—*Under section 1756, R. S. 1881, the refusal to quash an indictment for a defect or imperfection therein, which does not tend to the prejudice of the substantial rights of the defendant upon the merits, is not an available error for the reversal of the judgment. *Stout v. State, 407*
31. *Decedents' Estates.—Appeal to Supreme Court.—Dismissal of Appeal.—*Where an administrator considers himself aggrieved by a decision of a circuit court or judge thereof in vacation, growing out of any matter connected with a decedent's estate, and prosecutes an appeal from such decision to the Supreme Court, he is not required to file any appeal bond; but he must file a transcript of the record, on his appeal, in the Supreme Court, at the latest, within twenty days after such decision was made, unless, "for good cause shown," such time has been extended by the Supreme Court. Otherwise a motion to dismiss the appeal must be sustained. *Yearley v. Sharp, 469*
32. *Bill of Exceptions.—Partition.—Report of Commissioners.—*A bill of exceptions is necessary to present, in the Supreme Court, error of the court below in refusing to set aside a report of commissioners in partition. *Radcliff v. Radford, 488*
33. *Superior Court.—Appeal.—Estoppel.—Waiver.—*From the action of the court in general term reversing the judgment at special term, and remanding the cause, a party prayed an appeal to the Supreme Court, but filed no bond. Afterwards he appeared at special term, where the mandate of the general term was executed by sustaining a demurrer to his complaint, and, declining to amend, he excepted. He then, within the time allowed by law, perfected his appeal to the Supreme Court from the judgment at general term by filing a transcript. *Held*, that the action of the appellant at special term did not waive or estop the appeal prayed. *Turner v. Indianapolis, 51*

SURFACE WATER.

See CITY, 8, 9.

TAXES.

See EVIDENCE, 7; MORTGAGE, 12, 14; PARTITION, 2.

1. *Situs of Chattels.—Ownership by Non-Resident.—*Staves purchased by a citizen of another State, remaining in this State to receive a finishing process before shipment to another State, are taxable in this State. *Standard Oil Co. v. Combs, 179*
2. *Same.—Constitutional Law.—*Such taxation is not a regulation of commerce, nor is it a tax on exports, within the meaning of the National Constitution. *Ib.*
3. *Sale of Land for.—Quieting Title.—Complaint.—Lien of Purchaser.—Deed.—Recitals.—Exhibit.—Personal Property.—*A complaint by a purchaser at a sale of lands for taxes under the act of 1872, to quiet his title or enforce a lien for the taxes paid, which undertakes to state the particulars of his title, is bad to quiet title unless it aver compliance with every requirement of the law required to make a valid sale, but it is good to enforce the lien unless the sale is void for the reasons enumerated in section 255, 1 R. S. 1876, p. 128, and so, also, if the tax deed be made part of the complaint, if the deed do not recite that personal property of the land-owner could not be found, or had been exhausted. *Locke v. Callett, 291*

TELEGRAPH.

1. *Failing to Transmit Message.—Penalty.—Lex Loci.—Statute Construed.—*The statute, R. S. 1881, section 4176, giving a penalty for failure to

transmit a telegraphic message, does not apply to messages not sent from this State, and the sender only can recover the penalty.

Western Union, etc., Co. v. Reed, 195

2. *Same.*—*Special Damages.*—*Complaint After Verdict.*—A complaint to recover special damages for loss caused by the incorrect transmission of a telegram, which avers facts showing that the loss could not have been caused by the error, is bad after verdict. *Ib.*

THREATS.

See CRIMINAL LAW, 31.

TIME.

See CRIMINAL LAW, 10; NOTICE, 2; REDEMPTION; SHERIFF'S SALE.

TITLE.

See DEED, 2; EVIDENCE, 8, 10; PARTITION, 3; TAXES, 3; VENDOR AND VENDEE, 1, 2; WILL, 3.

TOWNSHIP TRUSTEE.

See NEGLIGENCE, 2; SCHOOLS.

TRANSCRIPT.

See COUNTY COMMISSIONERS, 1; SUPREME COURT, 1, 2, 31.

TRIAL.

See SUPREME COURT, 20.

TROVER. •

See CONTRACT, 10; CONVERSION.

TRUST AND TRUSTEE.

See DECEDENTS' ESTATES; GUARDIAN AND WARD; HUSBAND AND WIFE; MORTGAGE, 8.

USER.

See HIGHWAY, 2.

VALUE.

See SALE, 3, 4.

• VENDOR AND VENDEE.

See MARRIED WOMAN, 1; MORTGAGE, 7, 8; REAL ESTATE, ACTION TO RECOVER, 2, 3.

1. *Deed.*—*Delivery.*—*Fraud.*—A deed never delivered, but obtained without the knowledge or consent of the grantor, does not divest the grantor's title, and a subsequent purchaser from the grantee without notice for value will not be protected. *Henry v. Carson, 412*

2. *Same.*—*Rescission of Contract.*—*Notice.*—*Demand.*—*Quieting Title.*—*Complaint.*—C. contracted to sell land to M., a deed to be delivered on payment of a certain instalment of the purchase-money. The deed was prepared and left with C.'s attorney to be delivered on such payment. No payment was ever made, and the deed was not delivered, M. abandoning the purchase. The deed was in some manner improperly obtained and recorded, and there was then a regular chain of conveyances down to H. C. was absent from the country and knew nothing of these transactions.

Held, that the complaint by C. against H. to quiet title, averring these facts, was good on demurrer.

Held, also, that a subsequent suit by C. against M. for the purchase-money, brought by his attorney without his knowledge, resulting in a judgment and the collection of a part of it, by said attorney, none of

which, however, came to C.'s hands, was not such an affirmation of the contract of sale as would bar the action or require notice of rescission or demand of possession. *Ib.*

3. *Right of Possession.—Executory Contract.*—An executory contract for the purchase of land, which is silent as to the right of possession, does not give that right to the purchaser. *Griffin v. Rochester, 545*
4. *Same.—Judgment.*—A judgment in ejectment by the vendor, against the vendee of land, under an executory contract, does not interfere with any remedies to which the purchaser may be entitled upon the subsequent performance of his contract. *Ib.*

VENUE.

See CRIMINAL LAW, 2.

VERDICT.

See CRIMINAL LAW, 1, 3, 8, 9; NEGLIGENCE, 3, 4; SUPREME COURT, 1, 5, 29; TELEGRAPH, 2.

Practice.—New Trial.—Where there is a verdict against two, and one only moves for a new trial, he can make no question as to the verdict against the other. *Flood v. Joyner, 459*

VOLUNTARY SERVICES.

See COUNTY COMMISSIONERS, 6.

WAIVER.

See COURTS; CRIMINAL LAW, 10; MANDAMUS, 2; MORTGAGE, 11; SUPREME COURT, 2, 26, 33.

WARRANTY.

See SALE, 1 to 5.

WATERCOURSE.

See CITY, 8, 9.

WEIGHT OF EVIDENCE.

See SUPREME COURT, 15.

WIDOW.

See MORTGAGE, 1; WITNESS, 2.

WILL.

1. *Intention of Testator.—Rule of Construction.*—In construing a will the primary rule is to ascertain, and, if possible, give effect to, the intention of the testator; and this intention is to be ascertained from an examination of all the provisions of the will bearing upon the subject of inquiry. *Becker v. Becker, 154*
2. *Construction.*—A testator devised real estate to each of three sons, A., B. and C., which, upon the death of any without issue, should go to the "survivor or survivors," and, upon the death of any one with issue, the land devised to him should go to his children. A. died without issue, then B. died, leaving issue, a daughter, and then C. died without issue, with a widow surviving, to whom he devised all his lands. *Held*, that on the death of C. the daughter of B. did not take the estate devised to C. *Cooper v. Hayes, 386*
3. *Same.—Former Adjudication.—Jurisdiction.—Judgment.—Title to Land.*—A judgment of a court in Ohio construing a will is not conclusive as to the title to lands in this State, though the title depends upon the construction of the will. *Ib.*

WITNESS.

See BASTARDY, 2; CONTINUANCE; CRIMINAL LAW, 16, 27 to 30, 33 to 35, 39, 44; EVIDENCE, 4, 5, 9, 11; HIGHWAY; PRACTICE, 7; SUPREME COURT, 23.

1. *Competency of Parties.—Statute Construed.*—Section 499, R. S. 1881, making parties incompetent as witnesses, applies only to the cases specified therein. *Cross v. Herr, 96*
2. *Proof of Husband's Declarations by Wife.—Decedents' Estates.*—After the husband's death, his wife is a competent witness to prove his declarations made to others in her hearing. *McConnell v. Hannah, 102*
3. *Evidence.—Impeachment of Witness.*—Publications by a witness upon the subject to which his testimony relates are admissible in evidence to impeach his testimony. *Hartford v. State, 461*
4. *Same.—Instructions.—Weighing Evidence.—Jury.*—The law does not require the jury, in weighing the evidence of a witness in a criminal case, to consider the fact that the witness is the defendant on trial, and it is error so to instruct. *Ib.*
5. *Same.*—The testimony of a witness found by the jury to be true must be believed and acted upon, and it is error to instruct that it is only entitled to the same weight as that of other witnesses. *Ib.*

WORDS AND PHRASES.

See CRIMINAL LAW, 33.

WORK AND LABOR.

See CONTRACT, 9.

WRITTEN INSTRUMENT.

See CONTRACT, 1 to 3; CORPORATION; DEED, 1; PLEADING, 11.

END OF VOL. 96.

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